TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY,
PETITIONER,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 21, 1937.

CERTIORARI GRANTED FEBRUARY 15, 1937.

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

At Law. No. 4595

ANNISTON MANUFACTURING COMPANY, a Corporation,

v.

HARWELL G. DAVIS, Collector of Internal Revenue

COMPLAINT—Filed November 22, 1935

To the District Court of the United States for the Northern District of Alabama:

Now comes the Plaintiff, Anniston Manufacturing Company, a corporation, and respectfully shows to this Honorable Court the following facts:

First Count

1

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, and having its principal place of business at Anniston, Calhoun County, Alabama.

2

Defendant is a citizen of the United States, and a resident and inhabitant of Jefferson County, within this District and Division.

[fol. 2]

3

Defendant is now and has been United States Collector of Internal Revenue for the District of Alabama since July 3, 1933.

4

This is a suit of a civil nature arising under the Constitution and laws of the United States, and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

5

Defendant is indebted to Plaintiff in the principal sum of $257,935.77, together with interest thereon from the dates of payment hereinafter shown by reason of the facts set forth in the following paragraphs:

6

Defendant has collected from Plaintiff as cotton processing taxes, under the Agricultural Adjustment Act of 1933, Title 1, Public Law No. 10, 73rd Congress, approved May 12, 1933, the sum of $257,935.77 in the following installments, and on the dates of payment indicated, and for the periods stated:

[fol. 3]

Year	Month	Amount of Assessment	Date Paid	Payment Amount	Total
1933	August	$14,115.65	9/29/33	$4,705.22	
			10/30/33	4,705.22	
			11/29/33	4,705.21	$14,115.65
	September	12,058.83	10/30/33		12,058.83
	October	13,699.14	11/29/33		13,699.14
	November	15,708.51	12/30/33		15,708.51
	December	11,711.70	1/30/34		11,711.70
1934	January	17,479.43	2/26/34		17,479.43
	February	14,345.14	4/25/34		14,345.14
	March	15,810.31	5/26/34		15,810.31
	April	15,853.03	6/25/34		15,853.03
	May	16,717.43	7/28/34		16,717.43
	June	11,885.79	8/25/34		11,885.79
	July	4,912.49	9/28/34		4,912.49
	September	1,807.09	11/28/34		1,807.09
	October	15,718.37	12/24/34		15,718.37
	November	15,773.44	1/26/35		15,773.44
	December	12,956.16	2/26/35		12,956.16
1935	January	16,736.45	3/27/35		16,736.45
	February	14,742.67	4/29/35		14,742.67
	March	15,904.14	5/30/35		15,904.14
	Totals	$257,935.77			$257,935.77

7

The amounts collected from Plaintiff as processing taxes, described above, were claimed by said Defendant to be due under Section 9(a) of said Agricultural Adjustment Act by reason of the first domestic processing of cotton by Plaintiff as processor during the months stated.

8

The Secretary of Agriculture, acting pursuant to the provisions of Section 9(a) of said Agricultural Adjustment

[fol. 4] Act, issued a proclamation on July 14, 1933, which proclamation reads as follows:

"I, Henry A. Wallace, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cotton, a basic agricultural commodity."

The above is the only proclamation issued by the Secretary of Agriculture under said Section, proclaiming the determination that rental or benefit payments were to be made with respect to cotton.

9

The Secretary of Agriculture made no findings of fact and no statement of the grounds of his action in connection with his determination that rental and/or benefit payments were to be made with respect to cotton, and in issuing the proclamation quoted in paragraph 8.

10

Pursuant to Section 9(a) of said Agricultural Adjustment Act the Secretary of Agriculture issued regulations ascertaining and prescribing that for the purpose of said Act the first marketing year for cotton following the proclamation of July 14, 1933, described in paragraph 8 above, should begin August 1, 1933, on which date the processing tax became effective under Section 9(a) of said Act.

11

Pursuant to Section 9(a) of said Agricultural Adjustment Act, the Secretary of Agriculture, on July 14, 1933, [fol. 5] issued regulations determining, as of August 1, 1933, that the processing tax on the first domestic processing of cotton should be at the rate of $.042 per pound of lint cotton, net weight.

12

The sums collected from Plaintiff as processing taxes, described in paragraph 6 above, were collected at said rate

of $.042 per pound of lint cotton processed by Plaintiff during the months indicated in paragraph 6.

13

Plaintiff filed with Defendant a claim for refund on Treasury Department Form PT-24 covering all of the payments described in paragraph 6 above. Said claim for refund was filed on June 12, 1935. In said claim for refund Plaintiff assigned as the reasons for which the said claim should be allowed all of the grounds which are set up in this suit in paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23.

14

The claim for refund referred to in paragraph 13 was rejected by the Commissioner of Internal Revenue on August 16, 1935.

15

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof were illegally and erroneously collected because the provisions of the Agricultural Adjustment Act of 1933 (Title I, Public Law No. 10, 73rd Congress) imposing the processing tax are unconstitutional and void for the reasons set out in paragraph 16, 17, 18, 19, 20 and 21 hereof.

16

[fol. 6] The provisions of the Act imposing the processing tax are in violation of Article 1, Section 1, and Article 1, Section 8, clause 1 of the Constitution of the United States, and are unconstitutional and void because they constitute an improper and unlawful delegation to the Secretary of Agriculture of legislative power, particularly in the following respects:

(a) Under the provisions of Sections 8(1) and 9(a) of the Act, the question of whether processing taxes will or will not be imposed, and the question of whether and when processing taxes will be discontinued, is left to the unfettered and uncontrolled discretion of the Secretary of Agriculture, since no policy is declared and no standard set up as to whether, when, or in what circumstances or under what conditions, the Secretary of Agriculture shall determine upon and proclaim the making or the discontinuance

of benefit payments and thereby cause the processing tax to become effective or to cease, and no findings of fact, as to any required basis or as to the existence of any required circumstances or conditions are required as a condition of making such determination and proclamation, and no duty is imposed on the Secretary of Agriculture to make or not to make such determination and proclamation.

(b) Section 8(1) of the Act, from which the processing tax provisions of the Act are inseparable, undertakes to give the Secretary of Agriculture power to provide for rental or benefit payments to farmers "in such amounts as the Secretary deems fair and reasonable", and no policy is declared and no standard set up as to the Secretary of Agriculture's determination in this regard.

(c) Sub-sections (a), (b) and (c) of Section 9 of the Act undertake to confer upon the Secretary of Agriculture [fol. 7] the power of ascertaining the rates for processing taxes without providing a sufficiently definite standard or outline.

(d) Section 9(a) of the Act also undertakes to confer upon the Secretary of Agriculture the power to adjust processing tax rates from time to time when the Secretary finds such adjustment necessary to effectuate the declared policy of the Act which is too vague and obscure to furnish a valid standard for the exercise of delegated legislative power.

(e) Section 9(b) of the Act undertakes to confer upon the Secretary of Agriculture the power to change processing tax rates regardless of commodity prices, in order to prevent accumulation of surplus stocks that might result from the imposition of the tax at other rates, without defining the accumulation of surplus stocks.

(f) Section 9(a) of the Act undertakes to give the Secretary of Agriculture power to "ascertain" the marketing year for which processing taxes are to be effective, without providing any standard to govern the Secretary's ascertainment.

17

The provisions of the Act imposing the processing tax are in violation of the Tenth Amendment to the Constitution of the United States and are unconstitutional and

void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, (2) to fix and regulate prices of commodities, and (3) regulate and control the production of agricultural products and to fix the prices thereof; whereas, if any such powers of regulation exist, they are reserved [fol. 8] to the states under the provisions of the Tenth Amendment to the Constitution of the United States.

18

The provisions of the Act imposing the processing tax are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and are unconstitutional and void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, which business and industries are not so affected with a public interest as to warrant such governmental regulation or control; and (2) to fix and regulate prices of commmodities, which commodities are not so affected with a public interest as to warrant such governmental price fixing and regulation; and (3) to regulate and control the production of agricultural products and to fix and regulate the prices of agricultural products, although the production and prices of such agricultural products are not so affected with a public interest as to warrant such governmental price fixing and regulation.

19

The provisions of the Act imposing the processing tax are not authorized by Article 1, Section 8 or by any other provision of the Constitution of the United States, and are unconstitutional and void since the proceeds to be derived from the processing tax are not to be applied for a public purpose but are rather to be applied for the benefit of a single class of individuals.

[fol. 9]

20

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, errone-

ously, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and in violation of Article 1, Section 1 and Article 1, Section 8, Clause 1 of the Constitution of the United States, because the proclamation of the Secretary of Agriculture, dated July 14, 1933, that rental and/or benefit payments should be made with respect to cotton, contains no findings of fact and no statement of the grounds of the Secretary of Agriculture's action in determining that such payments should be made, and no such findings of fact or statement of grounds were made by the Secretary of Agriculture. Under the terms of the Act that proclamation made the cotton processing taxes effective.

21

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, erroneously and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and in violation of Article 1, Section 1 and Article 1, Section 8, Clause 1 of the Constitution of the United States, because in "ascertaining" the marketing year for which cotton processing taxes should be effective, the Secretary of Agriculture made no findings of fact or statement of grounds as to the basis of his action in determining such marketing year.

22

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof were collected illegally, erroneously and in violation of the provisions of the Agricultural Adjustment Act of 1933 because the said processing taxes were collected from the Plaintiff at a rate which was illegal and excessive, in that the Secretary of Agriculture acted arbitrarily and with abuse of his discretion in fixing the "'fair exchange value" of cotton, under Section 9 of the Act, at a figure grossly in excess of the price that would give cotton the same purchasing power, with respect to articles that farmers buy, as cotton had during the base period specified in Section 2 of the Act.

[fol. 10]

23

The processing taxes collected from the Plaintiff, as alleged in paragraph 6 hereof, for the marketing year begin-

ning August 1, 1934, were collected illegally, erroneously and in violation of the provisions of the Agricultural Adjustment Act of 1933 in that the Secretary of Agriculture failed to provide for a change of the rate of processing taxes for the marketing year beginning August 1, 1934, so as to give effect to the increase in the "current average farm price" of cotton at the beginning of said marketing year, the available statistics of the Department of Agriculture indicating that at the beginning of said marketing year the "current average farm price" of cotton was 13.1¢ per pound and "fair exchange value" of cotton was 15.3¢ per pound, upon the basis of which the rate of the processing taxes for the marketing year beginning August 1, 1934, should, under Section 9(b) of the Act, be only 2.2¢ per pound instead of 4.2¢ per pound as prescribed by the Secretary of Agriculture.

Wherefore, Plaintiff prays that process issue requiring Defendant to be and appear at the next term of this Honorable Court, to answer this petition, and Plaintiff prays [fol. 11] further for judgment against said Defendant in the principal sum of $257,935.77, with interest at 6% per annum on the sums scheduled in paragraph 6 above from the dates of payment thereof, as indicated.

Second Count

1

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, and having its principal place of business at Anniston, Calhoun County, Alabama.

2

Defendant is a citizen of the United States, and a resident and inhabitant of Jefferson County, within this District and Division.

3

Defendant is now and has been United States Collector of Internal Revenue for the collection District of Alabama since July 3, 1933.

4

This is a suit of a civil nature arising under the Constitution and laws of the United States, and the matter in

controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

5

Defendant is indebted to Plaintiff in the principal sum of $11,918.28, together with interest thereon from the dates of payment hereinafter shown by reason of the facts set forth in the following paragraphs:

[fol. 12] 6

As Collector of Internal Revenue, Defendant has collected from Plaintiff as cotton floor stock taxes under the Agricultural Adjustment Act of 1933, Title I, Public Law No. 10, 73rd Congress, approved May 12, 1933, the total amount of $11,918.28 in the following installments and on the dates indicated:

Amount of Assessment	Payment		
	Date Paid	Amount	Total
$11,918.28	8/29/33	$2,979.57	
	9/30/33	296.27	
	10/30/33	1,637.92	
	11/29/33	1,637.91	
	11/29/33	5,366.61	$11,918.28

7

The amounts collected from Plaintiff as cotton floor stock taxes, described above, were claimed by said Defendant to be due under Section 16(a) (1) of said Agricultural Adjustment Act of 1933 by reason of Plaintiff's holding, on August 1, 1933, certain articles processed wholly or in chief value from cotton, with respect to which a processing tax was to be levied under Section 9 of said Agricultural Adjustment Act.

8

The Secretary of Agricultural acting pursuant to the provisions of Section 9(a) of said Agricultural Adjustment Act, issued a proclamation on July 14, 1933, which proclamation reads as follows:

"I, Henry A. Wallace, Secretary of Agriculture of the United States of America, acting under and pursuant to [fol. 13] the Act of Congress known as the Agricultural

Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cotton, a basic agricultural commodity."

The above is the only proclamation issued by the Secretary of Agriculture under said Section, proclaiming the determination that rental or benefit payments were to be made with respect to cotton.

9

The Secretary of Agriculture made no findings of fact and no statement of the grounds of his action in connection with his determination that rental and/or benefit payments were to be made with respect to cotton, and in issuing the proclamation quoted in paragraph 8.

10

Pursuant to Section 9(a) of said Agricultural Adjustment Act, the Secretary of Agriculture issued regulations ascertaining and prescribing that for the purposes of said Act the first marketing year for cotton following the proclamation of July 14, 1933, described in paragraph 8 above, should begin August 1, 1933, on which date the processing tax became effective under Section 9(a) of said Act, and the floor stock tax became effective under Section 16 of said Act.

11

Pursuant to Section 9(a) of said Agricultural Adjustment Act, the Secretary of Agriculture, on July 14, 1933, issued regulations determining, as of August 1, 1933, that the processing tax on the first domestic processing of cotton should be at the rate of $.042 per pound of lint cotton, net weight.

[fol. 14]

12

The sums collected from Plaintiff as floor stock taxes described in paragraph 6 above, were collected at a rate of $0.044184 per pound of net cotton content of articles processed from cotton, and held by Plaintiff on August 1, 1933. Said floor stock tax rate was fixed by said Secretary of Agriculture, acting under Section 10(c) of said Agricul-

tural Adjustment Act, based upon the processing tax rate of $.042 per pound, described in paragraph 11 above.

13

On June 12, 1935, Plaintiff filed with Defendant claim for refund on Treasury Department Form PT-24. Said claim for refund covered all of the payments described in paragraph 6 above. In said claim for refund Plaintiff assigned as the reasons for which said claim should be allowed all of the grounds which are set up in paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23 of this petition.

14

The claim for refund, referred to in paragraph 13, was rejected by the Commissioner of Internal Revenue on August 16, 1935.

15

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof were illegally and erroneously collected because the provisions of the Agricultural Adjustment Act of 1933 (Title I, Public Law No. 10, 73rd Congress) imposing the floor stock tax are unconstitutional and void for the reasons set out in paragraphs 16, 17, 18, 19, 20, 21 and 22 hereof.

[fol. 15] 16

The provisions of the Act imposing the floor stock tax are in violation of Article 1, Section 1, and Article 1, Section 8, Clause 1, of the Constitution of the United States, and are unconstitutional and void because they constitute an improper and unlawful delegation to the Secretary of Agriculture of legislative power, particularly in the following respects:

(a) Under the provisions of Sections 8(1), 9(a), and 16 of the Act, the question of whether floor stock taxes will or will not be imposed is left to the unfettered and uncontrolled discretion of the Secretary of Agriculture, since no policy is declared and no standard set up as to whether, when, or in what circumstances or under what conditions, the Secretary of Agriculture shall determine upon and proclaim the making of benefit payments and thereby cause

the floor stock tax to become effective, and no findings of fact, as to any required basis or as to the existence of any required circumstances or conditions, are required as a condition of making such determination and proclamation, and no duty is imposed on the Secretary of Agriculture to make or not to make such determination and proclamation.

(b) Section 8(1) of the Act, from which the floor stock tax provisions of the Act are inseparable, undertakes to give the Secretary of Agriculture power to provide for rental or benefit payments to farmers "in such amounts as the Secretary deems fair and reasonable", and no policy is declared and no standard set up as to the Secretary of Agriculture's determination in this regard.

(c) Sub-sections (a), (b) and (c) of Section 9, and Section 16, of the Act undertake to confer upon the Secretary [fol. 16] of Agriculture the power of ascertaining the rates for floor stock taxes without providing a sufficiently definite standard or outline.

(d) Section 9(a) of the Act undertakes to give the Secretary of Agriculture power to "ascertain" the marketing year for which processing, and therefore floor stock, taxes are to be effective without providing any standard to govern the Secretary's ascertainment.

17

The provisions of the Act imposing the floor stock tax are in violation of the Tenth Amendment to the Constitution of the United States and are unconstitutional and void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, (2) to fix and regulate prices of commodities, and (3) to regulate and control the production of agricultural products and to fix the prices thereof; whereas, if any such powers of regulation exist, they are reserved to the states under the provisions of the Tenth Amendment to the Constitution of the United States.

18

The provisions of the Act imposing the floor stock tax are in violation of the due process clause of the Fifth

Amendment to the Constitution of the United States and are unconstitutional and void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, which business and industries are not so affected with a public interest as to warrant such governmental regulation or control; and (2) [fol. 17] to fix and regulate prices of commodities, which commodities are not so affected with a public interest as to warrant such governmental price fixing and regulation; and (3) to regulate and control the production of agricultural products and to fix and regulate the prices of agricultural products, although the production and prices of such agricultural products are not so affected with a public interest as to warrant such governmental price fixing and regulation.

19

The provisions of the Act imposing the floor stock tax are in violation of Article 1, Section 2, Paragraph 3, and Article 1, Section 9, Paragraph 4, of the Constitution of the United States, and are unconstitutional and void, because the floor stock tax is a direct tax on property not apportioned among the several states according to the number of their respective citizens as shown by the United States census.

20

The provisions of the Act imposing the floor stock tax are not authorized by Article 1, Section 8, or by any other provision of the Constitution of the United States, and are unconstitutional and void since the proceeds to be derived from the floor stock tax are not to be applied for a public purpose but are rather to be applied for the benefit of a single class of individuals.

21

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, erroneously, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and in violation of Article 1, Section 1, and Article 1, Sec-

[fol. 18] tion 8, Clause 1, of the Constitution of the United States, because the proclamation of the Secretary of Agriculture, dated July 14, 1933, that rental and/or benefit payments should be made with respect to cotton, contains no findings of fact and no statement of the grounds of the Secretary of Agriculture's action in determining that such payments should be made, and no such findings of fact or statement of grounds were made by the Secretary of Agriculture. Under the terms of the Act that proclamation made the cotton floor stock taxes effective.

22

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, erroneously and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and in violation of Article 1, Section 1, and Article 1, Section 8, Clause 1, of the Constitution of the United States, because in "ascertaining" the marketing year for which cotton processing taxes, and therefore cotton floor stock taxes, should be effective, the Secretary of Agriculture made no findings of fact or statement of grounds as the basis of his action in determining such marketing year.

23

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof were collected illegally, erroneously and in violation of the provisions of the Agricultural Adjustment Act of 1933 because the said floor stock taxes were collected from the Plaintiff at a rate which was illegal and excessive, in that the Secretary of Agriculture acted arbitrarily and with abuse of his discretion in fixing the "fair exchange value" of cotton, under Section 9 of [fol. 19] the Act, at a figure grossly in excess of the price that would give cotton the same purchasing power, with respect to articles that farmers buy, as cotton had during the base period specified in Section 2 of the Act.

Wherefore, Plaintiff prays that process issue requiring Defendant to be and appear at the next term of this Honorable Court to answer this petition, and Plaintiff prays further for judgment against said Defendant in the principal sum of $11,918.28, with interest at 6% per annum on the

sums scheduled in paragraph 6 above from the dates of payment thereof, as indicated.

W. A. Sutherland, Atlanta, Georgia; Joseph B. Brennan, Attorneys for Plaintiff. Sutherland, Tuttle & Brennan, First National Bank Bldg., Atlanta, Georgia.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed April 22, 1936

Now comes the defendant in the above entitled cause and by leave of Court first had and obtained withdraws the de-
[fol. 20] murrer heretofore filed in said cause and substitutes and files in lieu of said demurrer this motion to dismiss this cause because of a lack of jurisdiction in the Court to entertain the same and because of the following separate and several matters. In support of said motion to dismiss, the defendant says separately and severally as follows:

1. This Court is without jurisdiction to hear and determine this action for the following reasons:

A. The Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 730, in Section 21 (d) provides:

"(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to

which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In [fol. 21] any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the Court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930."

The effect of this section, as a matter of law, is to deprive the court of jurisdiction where the plaintiff has, as in this case, failed to submit his proof to the Commissioner of Internal Revenue on the question of whether the plaintiff has borne the burden of the amount of any tax, penalty, or interest imposed by Title 1 of the Agricultural Adjustment Act sought to be recovered, to-wit, that he has neither directly nor indirectly included any amount of such tax, penalty, or interest in the price of the article with respect to which it was imposed or any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any person in any manner, or included any such amount in the charge or fee for processing, and that the price paid by the plaintiff or such person was not reduced by any such amount.

B. The plaintiff does not allege any facts to show that it has complied with the requirements of section 21 (d) of said Act of August 24, 1935, above referred to.

C. The plaintiff has not alleged that a hearing has been held on its claim before the Commissioner of Internal Revenue, that any proof was submitted by plaintiff to, or that any finding was made by, the Commissioner of Internal [fol. 22] Revenue as to whether or not plaintiff has borne the burden of any amount of any tax, penalty, or interest assessed against or collected from plaintiff under the Agricultural Adjustment Act, herein sought to be recovered; or that a transcript of a hearing before the Commissioner of Internal Revenue has been duly certified and filed as the

record in the case as required by said Act of August 24, 1935.

2. Plaintiff's said complaint does not state facts sufficient to constitute a cause of action against this defendant for the following reasons:

A. Plaintiff has failed to allege any facts showing compliance with the provisions of Section 21 (d) (1) of the Agricultural Adjustment Act as amended by the Act of August 24, 1935, and any recovery against this defendant is therefore barred.

B. Plaintiff therein has failed to allege that it has, after the filing of a claim for refund or credit of any tax, penalty, or interest imposed by Title 1 of the Agricultural Adjustment Act as amended, whether accrued before, on, or after the date of the adoption of the Act of August 24, 1935, established to the satisfaction of the Commissioner of Internal Revenue—

(1) That neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included any amount of any such tax, penalty, or interest in the price when sold of the article with respect to which said tax, penalty, or interest was imposed or of any article processed from the commodity with respect to which it was imposed.

(2) That neither the claimant nor any person directly or [fol. 23] indirectly under his control or having control over him, has, directly or indirectly, passed on any amount of any such tax, penalty, or interest to the vendee or to any other person in any manner.

(3) That neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included any amount of any such tax, penalty, or interest in the charge or fee for processing.

(4) That the price paid by claimant or any person directly or indirectly under his control or having control over him, has not been reduced by any amount of any such tax, penalty, or interest.

C. Plaintiff's said complaint does not state any facts which would warrant a judgment by the court against this defendant and in favor of plaintiff.

3. Plaintiff's said complaint and each count thereof, separately and severally, is insufficient to confer jurisdiction upon this Court to hear and determine upon the merits thereof the matters sought to be alleged therein for the following reasons:

A. It affirmatively appears from the allegations thereof that the alleged claim for a refund alleged to have been filed with the Commissioner and by him denied or rejected was insufficient to warrant its allowance by the Commissioner and is wholly inadequate to sustain a cause of action in this Court for the refusal or rejection thereof by the Commissioner.

B. It affirmatively appears from the allegations thereof that the plaintiff did not, prior to the institution of this suit, pursue its administrative remedies in the manner and to the extent required by law as a condition precedent to the filing of the action in this Court.

[fol. 24] C. The plaintiff avers that its claim for refund assigned as the reasons for which the said claim should be allowed, all of the grounds set up in said petition or complaint in paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23 and it affirmatively appears from the allegations contained in said just mentioned paragraphs that the plaintiff, prior to institution of this suit, failed to comply with the provisions of Section 21 (d) of the Agricultural Adjustment Act as Amended by the Act of August 24, 1935, which said Section is hereinabove copied.

Jim C. Smith, United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed June 12, 1936

Now Comes the Plaintiff above named, and, with leave of court first had and obtained, amends its complaint heretofore filed in the following particulars:

I. By adding a new paragraph to the First Count of the original complaint, to be known as paragraph 24, as follows:

[fol. 25] 24

All of the sums scheduled in paragraph 6 of the First Count of the original complaint were paid by Plaintiff to Defendant under duress and solely to prevent the imposition of penalties and seizure of Plaintiff's property. At the time of making all of said payments, except the first payment, in the sum of $4705.22, Plaintiff protested to Defendant that said taxes were illegal and unconstitutional.

II. By adding a new paragraph to the Second Count of the original complaint, to be known as paragraph 24, as follows:

24

All of the sums scheduled in paragraph 6 of the Second Count of the original complaint were paid by Plaintiff to Defendant under duress and solely to prevent the imposition of penalties and seizure of Plaintiff's property. At the time of making all of said payments, except the first two, in the sum of $2979.57 and $296.27, respectively, Plaintiff protested to Defendant that said taxes were illegal and unconstitutional.

III. By adding two new paragraphs to each of the Counts of the original complaint, to be known as paragraphs 25 and 26, respectively, as follows:

25

Plaintiff alleges that Section 21(d) of the Agricultural Adjustment Act, as Amended by the Act of August 24, 1935, can have no effect upon this suit, for the reason that if said Section should be construed to be applicable to this suit, it would be invalid on the following grounds as violative of the following constitutional provisions:

(A) Section 21(d)(1) is repugnant to the due process [fol. 26] clause of the Fifth Amendment to the Constitution, in that it undertakes to impair and destroy the vested right of action which Plaintiff had against Defendant, prior to the Act of August 24, 1935, for the recovery back of the floor stock and processing taxes which Defendant had illegally collected from Plaintiff as described in the original complaint. Said Section 21(d)(1) undertakes to impair and destroy said vested right by imposing upon processors,

as a condition precedent to recovery, the burden of proving facts which are not susceptible of proof, and the proof of which is inherently impossible in any case.

(B) Section 21(d)(1) is repugnant to the due process clause of the Fifth Amendment to the Constitution in that said Section undertakes to impose conditions, which are vague, uncertain and unintelligible, and which therefore cannot be complied with, on the recovery of floor stock and processing taxes illegally collected, and said Section thereby undertakes to impair and destroy Plaintiff's vested right of action for the recovery of such taxes.

(C) Assuming that the conditions on recovery imposed by Section 21(d)(1) are not inherently impossible to prove, said Section is repugnant to the due process clause of the Fifth Amendment to the Constitution for the reason that said Section undertakes to confiscate, and deprive the process or from recovering, the portion of such floor stock and processing taxes which has been absorbed by such processor if any part of the tax has been passed on to others or if the processor has reduced the amount paid by him for the taxable commodity by any part of the tax.

(D) Assuming that the conditions on recovery imposed by Section 21(d)(1) are not inherently impossible to prove, said Section is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that the conditions imposed by said Section are arbitrary and unreasonable; [fol. 27] and even if the floor stock and processing tax had been passed on or passed back, as described in said Section 21(d)(1), Plaintiff cannot, for that reason consistently with due process of law, be deprived of the right to recover such floor stock and processing taxes as have been illegally collected from it.

(E) Section 21(d)(1) and Section 21(e) are repugnant to the due process clause of the Fifth Amendment to the Constitution, in that they arbitrarily and unreasonably restrict Plaintiff's right to a fair administrative remedy.

(F) Section 21(d)(1) is repugnant to Article III of the Constitution and to the Constitutional requirement of the separation of powers in that said Section undertakes to confer upon constitutional courts duties which are not judicial in nature and said Section also undertakes to deprive

such courts of their inherent judicial powers in matters falling within their appointed jurisdiction. The constitutional defects here enumerated result from the conclusive effect given by said Section 21(d)(1) to the findings and determination of the Commissioner of Internal Revenue.

(G) Section 21(d)(1) is repugnant to the Seventh Amendment to the Constitution, in that it in effect deprives processors of the right to a jury trial in an action against a collector of internal revenue for the recovery back of floor stock and processing taxes illegally collected, said action being one at common law against the collector personally.

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The questions whether and to what extent floor stock and processing taxes have been passed on to others by the taxpayers, and whether the price paid by processors for taxable commodities has been reduced by any part of the processing tax, and whether the taxpayers have borne the burden of any amount of such taxes, or whether they have [fol. 28] shifted such burden to others, are questions which are not susceptible of proof. The inherent impossibility of proving such matters is apparent from a consideration of the manner and methods of business and operation employed by cotton mills. The operation of a cotton mill, such as the mills operated by this Plaintiff, are described in the following subparagraphs:

(A) Lint cotton is purchased by the cotton mills in a competitive market. The prices paid for the commodity vary as to particular grades, staple, and character, and they fluctuate daily. Prices in the cotton market are affected by the extent of the demand for cotton in this country and abroad, the supply of spot cotton, Government crop reports and prognostications, changing weather conditions in the cotton belt of this country and in other cotton growing countries, world news affecting trade in general, such as boycotts, war scares, etc., and a myriad of circumstances that cannot be recognized or identified in detail. Plaintiff buys the lint cotton which it processes in such a market, and pays the market price therefor. The price which Plaintiff has paid for the cotton, upon the processing of which the taxes covered by this action were imposed, was never reduced below the market price on account of any part of such

taxes. On the other hand, Plaintiff alleges that it is impossible to ascertain whether and to what extent the imposition of said floor stock and processing taxes and the possibility of their termination or change in rate affected the market price of lint cotton, and it is therefore impossible to ascertain whether and to what extent the price paid by Plaintiff for said lint cotton was reduced on account of the imposition of said floor stock and processing taxes.

(B) The lint cotton, upon the processing of which the taxes covered by this suit were imposed, was acquired by Plaintiff in bales of varying weights, usually approximately [fol. 29] 500 pounds. The processing tax attached, under the Agricultural Adjustment Act, upon the very first steps of processing, that is when the cotton bales were opened to be put into a mixing machine.

(C) Lint cotton is graded into various classifications, depending upon the length of its staple, color and character. Usually, as the first step in the processing of cotton by a cotton mill, bales of different grades of cotton, purchased at different times and under varying circumstances, are mixed or blended together in a mixing machine. The cotton must then be put through processes to prepare the fibres for spinning. The following processes are used: For Carded Yarn, or Cloth, the processes are Opening, Picking, Carding, Drawing (1 to 3 processes), Slubbing, Intermediates and five frames known as Fly Frames. Following this is the Spinning. For Combed Yarn the processes are Opening, Picking, Carding, Sliver Laps, Machine Laps, Combing, Drawing (1 to 3 processes), Slubbing, Intermediates, Second Intermediates, Jack Frames and Spinning. Then Spooling or Winding and Warping follow in both instances. This is followed by the weaving in the case of cloth. During each of said processes certain waste portions and original cotton are separated as waste from the portion which is put into further process in the manufacture of yarn or cloth. Some of these waste portions is marketable and some is not. Different grades and kinds of marketable waste result from each of the above processes. Some of it is simply spun into yarn. Some of it is spun into yarn and then twisted in from 2 to 40 strands. It is then ready for further processing. Additional waste results from the spinning operations.

(D) Some of the yarn produced by the operations described above is woven into fabrics on looms. Some is twisted and some is not twisted, and some is wound on cones, or tubes, or packaged as skeins or warps.

[fol. 30] (E) It is impossible to estimate accurately the length of time which it takes for the cotton to go through all of the various processes described above. In actual practice the operation of the various Departments of a cotton mill are seldom correlated in such a way that a particular lot of cotton moves without interruption through all of the various processes of manufacturing. The processed cotton coming from the carding and combing machines at times may go immediately into the processes above described, and at other times may be held for a period of three or four days, or longer, before it reaches the machines. Similar interruptions may occur between the spinning and weaving operations, and between each of the separate minor processes connected with spinning and weaving. Plaintiff estimates that from the time a bale of cotton is opened and put into the first processes at Plaintiff's plant (and therefore at the time the floor stock and processing tax attached), until the time when the cotton from such bale finds its way into cloth, one of the finished products of the Plaintiff, a period of thirty working days would have elapsed, assuming that Plaintiff's plant in all departments was during said period operated on two daily shifts of eight hours a day, and assuming further that there were no interruptions between the various steps of processing and manufacturing as described above. Nevertheless, in view of the fact that such interruptions do occur, and did occur during the period for which the taxes here in controversy were collected, it is absolutely impossible to estimate the length of time that elapsed between the first processing of any single bale of cotton and the production of any lot of finished goods.

(F) It is impossible to ascertain what amount of the processing tax was paid with respect to the processing of the cotton from which any particular lot of finished goods were produced. The cotton, upon the processing of which [fol. 31] the tax was imposed, does not all find its way into the principal finished products of the Plaintiff. As explained above, some of it goes into marketable waste and some goes into non-marketable waste. The percentage of

a bale of lint cotton, or even of the original mixture of lint cotton, which goes into waste varies widely, depending upon the grade of cotton, the length and uniformity of its staple, its original moisture content, and other inherent qualities.

(G) Even if there were a uniform and ascertainable percentage of waste resulting from the processing of any particular lot of lint cotton, it would be impossible to allocate or apportion the tax paid upon the first processing of such lint cotton as between the principal finished products and the by-products of a cotton mill. If such tax should be apportioned between the principal finished products and the marketable waste of a cotton mill upon the basis of comparative values of such products and by-products, the absurd result would be reached of apportioning the entire amount of tax paid upon the processing of the original lint cotton as between products resulting from the manufacture of only a part of the original lint cotton, leaving no part of the tax to be apportioned to the non-marketable waste, which is produced from the processing of the original lint cotton upon which the tax was imposed. Moreover, the comparative values of the finished products and by-products, i. e., the various classes of marketable waste, vary from day to day and no uniform apportionment could be made.

(H) On the other hand, if the floor stock and processing tax should be apportioned between all of the materials resulting from the processing of the original lint cotton upon the basis of comparative weights, the result would be that a part of the tax would be apportioned to non-marketable waste and a part would be apportioned to certain classes [fol. 32] of marketable waste which must be sold by the cotton mill at a price per pound less than the rate of tax paid on the processing of original lint cotton.

(I) Even if it were possible to ascertain the amount of the tax imposed upon the processing of the cotton from which a particular lot of finished goods was produced, it would be inherently impossible to ascertain whether the cotton mill has "included such amount in the price of the article with respect to which it was imposed or of any article processed from the cotton with respect to which it was imposed"; and it would also be inherently impossible to ascertain whether the cotton mill has "passed on any part of such amount to the vendee or to any other person."

(J) The Plaintiff, like other cotton mills, sells its finished products in a competitive market and the prices which Plaintiff is able to charge for its products are subject to wide fluctuations and frequent changes. Such prices are affected by the laws of supply and demand, the changing purchasing capacity of the people who buy the products of the cotton mill, changing labor conditions in, and the extent of Governmental regulation in, such trades as make use of the cotton mill's products for further processing and manufacturing, and a myriad of circumstances that cannot be recognized or identified in detail. Plaintiff alleges that it is impossible to ascertain whether and to what extent the imposition of said floor stock and processing taxes affected the market price of the finished products of the kind manufactured by Plaintiff, and it is therefore impossible to ascertain whether and to what extent the price received by Plaintiff for its finished products was increased on account of the imposition of said floor stock and processing taxes. Plaintiff alleges further that it is inherently impossible to ascertain, in the case of any particular sale of its products, manufactured from cotton upon the processing of which said [fol. 33] taxes were imposed, whether the profit was as great, or the loss was as small, as it would have been if said floor stock and processing taxes had never been imposed. Plaintiff alleges further that it is inherently impossible to ascertain the profit which Plaintiff would have made, or the loss which Plaintiff would have sustained on any particular sale of its products, or during any particular time unit during the period covered by this suit, if said floor stock and processing tax had never been imposed.

(K) Even if it should be assumed that it were possible to ascertain that Plaintiff was able to increase the prices charged for its products, by the amount of the floor stock and processing tax, it would still be inherently impossible to ascertain to what extent the increased prices deterred purchasers from buying Plaintiff's products, and therefore the extent of loss which Plaintiff suffered as a result of the unlawful imposition of the floor stock and processing tax. Any decrease in production caused by decreased demand increased Plaintiff's manufacturing cost and overhead burden per pound, and in such instances decreased Plaintiff's profits on sales actually made.

(L) Even if it were possible to ascertain in the case of a particular sale of Plaintiff's products that the price charged by Plaintiff was not any greater than it would have been if the floor stock and processing tax had never been imposed, and even if it were possible to ascertain, in the case of the purchase of any particular lot of lint cotton by the Plaintiff, that the price paid by the Plaintiff was not any less than it would have been if the floor stock and processing tax had never been imposed, it would still be inherently impossible for Plaintiff to satisfy the conditions imposed by Section 21(d)(1) for the reason that it would be inherently impossible for Plaintiff to trace the cotton content of the goods covered by any particular sale of Plaintiff's finished products back to the particular purchase of the lint cotton from [fol. 34] which such finished goods were produced. This impossibility results from the delays and interruptions in the various processes of manufacturing which have been described above. Plaintiff's records were not kept in such a way, nor could they have been kept in such a way, as would have enabled Plaintiff to earmark or identify the cotton content of any lot of its finished products with reference to the particular purchases of lint cotton from which such goods were produced. Section 21(d)(1) clearly conditions Plaintiff's right of recovery upon the establishment, with respect to each particular sale, that the tax was neither passed on in the selling price of the finished product, nor passed back by a reduction in the purchase price of the lint cotton from which such finished goods were produced. Plaintiff alleges that there is an inherent impossibility of making such proof in any case.

Joseph B. Brennan, Sutherland, Tuttle & Brennan,
Atlanta, Georgia, Attorneys for Plaintiff.

The foregoing amendment read and considered. The same is allowed subject to demurrer.

This 12th day of June, 1936.

David J. Davis, United States Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO MOTION TO DISMISS BILL OF COMPLAINT—Filed June 12, 1936

Comes the defendant, by Jim C. Smith, United States Attorney for the Northern District of Alabama, and by leave of court first had and obtained, amends his motion to dismiss the bill of complaint, as amended, and, in support thereof, assigns, separately and severally:

4. Plaintiff's complaint, and each count thereof, as amended, is insufficient to confer jurisdiction upon this Court to hear and determine upon the merits thereof the matters sought to be alleged therein for the following reasons:

A. The Agricultural Adjustment Act, as amended by Act of Congress of August 24, 1935, in Section 21(g) thereof, provides:

"The provisions of Section 3226 Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, [fol. 36] which accrued, before, on, or after the date of the adoption of this amendment under this title, (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of Section 15, Section 16, or Section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930."

And Section 3226 Revised Statutes, (Section 1672, Title 26, U. S. C. A.) provides that:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for re-

fund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

And defendant says that Section 21(d) (1) of the aforementioned Agricultural Adjustment Act as amended, provides in part for what must be contained in said claim for refund, and that the plaintiff has not, either in its claim for refund or in its complaint, and each count thereof, alleged any facts showing a compliance with said sections, and that in consequence thereof, this court is without jurisdiction to permit the plaintiff to maintain this suit and without jurisdiction to award a judgment for recovery of the taxes sought.

B. It is not alleged in said complaint, and each count [fol. 37] thereof, as required by law that "neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount", and defendant says that, without such allegations being made in said count by the plaintiff, this court is without authority and jurisdiction to permit the maintenance of this suit, or to render a judgment in favor of the plaintiff.

C. For that it affirmatively appears from the allegations of said count that the plaintiff has not complied with the conditions prescribed by law for the maintenance of this suit in this court, said conditions being those prescribed by Section 3226 Revised Statutes and Section 21(d) 1 to 21(g) of the Agricultural Adjustment Act, as amended by Act of August 24, 1935, to which reference is hereby made.

Jim C. Smith, United States Attorney, Attorney for the Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed July 3, 1936

Now Comes the Plaintiff in the above entitled cause, and, with leave of court first had and obtained, amends its complaint heretofore filed in the following particulars:

I. By adding a new paragraph to each of the counts of the original complaint, to be known as paragraph 27, as follows:

27

On June 22, 1936, the President approved the Revenue Act of 1936, Public Law No. 740, 74th Congress, Title VII of which relates to "refunds of amounts collected under the Agricultural Adjustment Act." In so far as the provisions of said Act purport to afford a defense to actions for the recovery back of floor stock and processing taxes illegally collected under the AAA, said provisions are unconstitutional and inapplicable for the following reasons:

(a) Section 902 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that it undertakes to impair and destroy [fol. 39] the vested right of action which Plaintiff had against Defendant for the recovery back of floor stock and processing taxes which the Defendant had illegally collected from Plaintiff, as described in the original complaint. Said Section 902 undertakes to impair and destroy said vested right of action by imposing upon taxpayers, as a condition precedent to recovery, the burden of proving facts which are not susceptible of proof, and the proof of which is inherently impossible in any case.

(b) Section 902 is repugnant to the due process clause of the Fifth Amendment to the Constitution in that said Section undertakes to impose conditions, which are vague, uncertain and unintelligible, and which therefore cannot be complied with, on the recovery of floor stock and processing taxes illegally collected, and said Section thereby undertakes to impair and destroy Plaintiff's vested right of action for the recovery of such taxes.

(c) Assuming that the conditions on recovery imposed by Section 902 are not inherently impossible to prove, said

Section is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that the conditions imposed by said Section are arbitrary and unreasonable; and even if the burden of floor stock and processing tax had been shifted by the taxpayer to others, as described in Section 902, Plaintiff cannot, for that reason, consistently with due process of law, be deprived of the right to recover such floor stock and processing taxes as have been illegally collected from it.

(d) Section 903 of the Revenue Act of 1936 is inseparably connected with Section 902 and other provisions of Title VII of said Act which are unconstitutional, and said Section cannot therefore afford a defense to this action.

(e) Section 904 of said Act is expressly made inapplicable to processing taxes, and said Section, as applied to floor [fol. 40] stock taxes; is inseparably connected with Section 902 and other provisions of Title VII of the Revenue Act of 1936, which are unconstitutional, and said Section 904 therefore cannot afford a defense to this action.

(f) Section 906 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that said Section arbitrarily and unreasonably restricts and denies Plaintiff's right to a fair administrative remedy. Section 906(d) purports to give claimants the right to have witnesses subpoenaed, and to authorize the so-called "presiding officer" to require, by subpoena, the attendance and testimony of witnesses, but no provision is made for the enforcement of such subpoenas, or for penalties for failure to answer and comply with same. Section 906 provides for a hearing to be conducted by a so-called "presiding officer", who is to recommend findings of fact and a decision, but the findings of fact and decision are to be rendered by the Board of Review, which shall not have heard the evidence. Section 906 does not limit the presiding officer, in his recommendations, or the Board, in its findings and decision, to a consideration of the evidence adduced at the hearing. Such procedure lacks due process of law.

(g) Section 906 is repugnant to Article III of the Constitution and the constitutional requirement of the separation of powers, in that said Section undertakes to confer upon constitutional courts duties which are not judicial in

nature, and said Section also undertakes to deprive such courts of their inherent judicial powers in matters falling within their appointed jurisdiction.

(h) Section 906 is repugnant to the Seventh Amendment to the Constitution, in that it undertakes to deprive processors of the right to a jury trial in an action against a collector of internal revenue for the recovery back of floor [fol. 41] stock and processing taxes illegally collected, said action being one at common law against the Collector personally.

(i) Section 907 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment, to Article III and to the constitutional requirement of the separation of powers, in that said Section undertakes to create a presumption which is arbitrary and unreasonable. There is no rational connection between the facts to be proved and the ultimate facts to be presumed under said Section. The statutory presumption created by Section 907 rests upon a false hypothesis and assumption of facts. Said presumption is in effect made irrebuttable and conclusive, in that Section 907(e) provides for rebutting the presumption only by proof of the actual extent to which the claimant shifted to others the burden of the processing tax, a matter which is not susceptible of legal proof. The enumeration of certain particulars in which Section 907 violates the constitutional provisions cited in this sub-paragraph are not stated as being exclusive.

(j) Sections 902 and 907 violate the due process clause of the Fifth Amendment in arbitrarily and unreasonably shifting to taxpayers the burden of proof with respect to an alleged defense to proceedings for the recovery of taxes illegally collected.

(k) The inherent impossibility of establishing the conditions imposed by Section 902 is apparent from the facts alleged in the subparagraphs of paragraph 26 of each count as amended June 12, 1936.

(l) Section 910 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment, in that it undertakes to destroy the vested right of action which Plaintiff and other taxpayers had against the Collector of Internal Revenue personally for the recovery back of floor

[fol. 42] stock and processing taxes illegally collected under the unconstitutional AAA.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

The foregoing amendment read and considered. The same is allowed subject to demurrer.

This 3rd day of July, 1936.

David J. Davis, United States Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER OF DEFENDANT—Filed June 12, 1936

Comes the Defendant and demurs to the complaint and each count thereof, separately and severally, and to the complaint, as amended, and to each count thereof, separately and severally, as amended, and assigns, as grounds of said demurrer, each of the grounds set forth in his motion, as amended, and here assigns, separately and severally, each of the grounds, separately and severally, contained in said [fol. 43] motion, as amended, to dismiss this cause, which motion is on file in this cause, and to which reference is hereby made for a description of said grounds of demurrer.

In addition to the grounds contained in said motion to dismiss, as same has been amended, the defendant assigns separately and severally the following additional grounds of demurrer:

1-A. It is not alleged in said count, except by way of conclusion of the pleader, that the plaintiff prior to the institution of this suit complied with the conditions precedent to the maintenance in this court of this cause of action.

2-A. It does not appear from the allegations of said count that prior to the institution of this suit a claim for refund as prescribed by the Agricultural Act as amended by Act of August 24, 1935, was presented to the Commissioner of Internal Revenue and by him denied.

3-A. It does not appear from the allegations of said count that prior to the institution of this suit the plaintiff

presented to the Commissioner of Internal Revenue a claim for refund, based upon the grounds set forth in Section 21 (d) (1) of the Agricultural Adjustment Act, as amended by Act of August 24, 1935, and that such a claim was by said Commissioner denied.

4-A. The allegations of said count that Section 21 (d) (1) of the Agricultural Adjustment Act, as amended, is unconstitutional, are mere conclusions of the pleader.

5-A. The allegations of said count, as amended, that it is impossible for the plaintiff to establish the proof required by Section 21 (d) (1) of the Agricultural Adjust-
[fol. 44] ment Act, as amended by Act of August 24, 1935, are insufficient to warrant the court in concluding as matter of law that said Section is unconstitutional in such form and fashion as to relieve the plaintiff from complying with its terms prior to the institution of this suit.

6-A. It is not alleged in said count, as amended, that prior to the institution of this suit the plaintiff made any attempt to comply with the terms of Section 21 (d) (1) of the Agricultural Adjustment Act, as amended.

7-A. For aught that appears from the allegations of said count, as amended, other parties having claims for refund under said Act of Congress are and will be able, prior to instituting suits, to comply with the terms and conditions set forth and prescribed by Section 21 (d) (1) of the Agricultural Adjustment Act, as amended.

Jim C. Smith, U. S. Attorney, Attorney for Defendant.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS, ETC.—Filed June 13, 1936

This cause coming on for hearing on this the 12th day of June, 1936, come the parties herein, the plaintiff, by Messrs. Sutherland, Tuttle & Brennan, its counsel, and the defendant, by Mr. Jim C. Smith, United States Attorney for the Northern District of Alabama, and the plaintiff moves the court to permit an amendment to its complaint,

which motion is allowed, and said amendment in writing is ordered filed; thereupon the defendant moves the court to allow the defendant to withdraw the demurrer heretofore filed and to substitute therefor a motion in writing to dismiss the complaint, as amended, which motion is hereby allowed, and said demurrer is ordered withdrawn; thereupon the motion in writing heretofore filed in said cause is allowed; thereupon defendant asks leave of the court to amend said motion to dismiss, and leave of court is granted the defendant to amend said motion and said amendment in writing is hereby allowed; the court understanding said motion, as amended to dismiss the complaint and each count thereof, as amended, overrules and denies said motion, as amended, to which action of the court de- [fol. 46] fendant excepts, which exception is hereby allowed; thereupon the defendant files and interposes a demurrer to the complaint, as amended, and to each count of the complaint, as amended, and said demurrer is argued by respective counsel, and the court not now being ready to announce its decision upon said demurrer and the questions raised thereby, takes the same under advisement.

Done this the 12th day of June, 1936.

David J. Davis, United States District Judge.

In United States District Court

[Title omitted]

Amendment to Demurrer—Filed June 25, 1936

Now comes the Defendant in the above-entitled cause and by leave of Court first had and obtained, amends the demurrer heretofore filed in this cause by adding thereto the following separate and several grounds:

1 (b). That this Court does not have jurisdiction of the matters and things complained of in the complaint and to render judgment in favor of the Plaintiff on the allegations contained in said complaint, and each count thereof, [fol. 47] for the reason that under the Revenue Act of 1936, which was signed by the President of the United States on June 23, 1936, it is provided in Section 901 thereof that Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Ad-

justment Act, as amended August 24, 1935, are repealed, and that by Section 904 thereof it is provided that:

"Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought."

And that by Section 906 (a) thereof it is provided that notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax under the Agricultural Adjustment Act, except as provided in said section, and Defendant says that there is nothing contained in said section which authorizes the maintenance of this suit which was brought and instituted prior to the enactment of said statute.

[fol. 48] 2 (b). For that it affirmatively appears from the allegations of said complaint, and each count thereof, that the Plaintiff has not complied with Sections 902, 903, 904, 906, and 907, respectively, and each subdivision thereof, respectively, of the Revenue Act of 1936, which was signed by the President of the United States and became law on June 23, 1936, and each of the sections is hereby referred to and adopted the same as if specifically herein copied.

Wherefore, the Defendant says that this Court no longer has jurisdiction to permit the Plaintiff to maintain this suit in this Court and no longer has jurisdiction to render judgment in this cause in favor of the Plaintiff and against the Defendant. Jim C. Smith, United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO DEMURRER—Filed July 6, 1936

Now comes the Defendant in the above-entitled cause and by leave of Court first had and obtained, further [fol. 49] amends the demurrer heretofore filed in this cause by adding thereto the following separate and several grounds:

3(b). It is not averred in said count, except by way of conclusion, that the sections, separately and severally, of the Revenue Act of 1936 therein mentioned are unconstitutional;

4(b). It affirmatively appears from the allegations of said count that the plaintiff has not complied, or attempted to comply, with the provisions of Section 906 of the Revenue Act of 1936, and that the Plaintiff would have the Court to assume jurisdiction in this cause and render judgment without the Plaintiff having complied, or attempted to comply, with the provisions of said section;

5(b). For that since the enactment of Sections 9 and 10 of the Revenue Act of 1936, which sections are hereby adopted and referred to as fully as if set out herein, the Defendant Collector of Internal Revenue is not in any way liable to the Plaintiff;

6(b). For that it is not averred in said count that the Defendant Collector, in committing the acts alleged therein, did so wilfully and intentionally;

7(b). For that it affirmatively appears from allegations of said count that the Defendant Collector, in committing the acts alleged therein, did so in the performance of his duties under the provisions of the Agricultural Adjustment Act and that the Defendant Collector acted under the direction of the Commissioner of Internal Revenue of the United States in collecting the money mentioned and claimed in said count;

8(b). For that under the provisions of Sections 902 to 912, both inclusive, of the Revenue Act of 1936, which sections respectively are hereby referred to as fully as if set

out herein and hereat, this Court does not have jurisdiction to render a judgment herein on the allegations contained in [fol. 50] said count in favor of the Plaintiff and against the Defendant Collector;

9(b). For that it affirmatively appears that since the enactment of Sections 902 to 912, both inclusive, of the Revenue Act of 1936, the United States of America is a proper party to this suit and the said United States of America has not consented to be sued in this Court for the matters and things set forth and alleged in said count of Plaintiff's complaint as last amended, but that on the contrary, the Congress of the United States has expressly declined to give its consent for the United States of America to be sued in this Court upon said allegations;

10(b). For that the allegations of said count, in substance, to the effect that it is impossible for the Plaintiff to comply with Sections 902 to 914, both inclusive, of the Revenue Act of 1936, are mere conclusions of the pleader, and it does not appear therefrom that other parties having like claims against the Government and who kept proper books of accounting in respect to said taxes are unable to comply therewith.

Jim C. Smith, United States Attorney.

[fol. 51] In United States District Court, Northern District of Alabama, Southern Division

At Law. No. 4570

Lincoln Mills of Alabama, a Corporation, Plaintiff,

v.

Harwell G. Davis, Individually and as Collector of Internal Revenue, Defendant

At Law. No. 4595

Anniston Manufacturing Company, a Corporation, Plaintiff,

v.

Harwell G. Davis, Individually and as Collector of Internal Revenue, Defendant

At Law. No. 4607

STANDARD-COOSA-THATCHER COMPANY, a Corporation, Plaintiff,

v.

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue, Defendant

At Law. No. 4608

SANQUOIT SPINNING MILLS, a Corporation, Plaintiff,

v.

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue, Defendant

OPINION—Filed July 6, 1936

These are suits by plaintiffs against Harwell G. Davis, as Collector of Internal Revenue and individually, to re- [fol. 52] cover floor and processing taxes collected from them under the Agricultural Adjustment Act. The defendant filed a motion to dismiss for want of jurisdiction upon the ground, among others, that there was no averment that the plaintiffs had complied with Section 21(d) of the Amendment of August 24, 1935 to the Agricultural Adjustment Act. Being of the opinion that the same question could be reached by demurrer, I overruled the motion. The defendant demurred upon the same grounds.

Section 21(d) of said Act was repealed by the Revenue Act of 1936. The defendant amended his demurrer by adding the ground that it is not alleged that plaintiffs have complied with Section 902 of the 1936 Revenue Act. This section conditions plaintiffs' right of recovery upon their establishing that they have borne the burden of the tax and have in no way shifted the burden to others.

These are suits in the nature of an action for money had and received. The plaintiffs cannot recover until they show that the defendant has money in his possession which, in morals, equity and good conscience belongs to them. Where plaintiffs sell a shirt, the purchaser pays the tax to them, and they pass it on to the Government, certainly, there is no moral right in them to recover this tax.

Plaintiffs, however, contend that before Section 21(d) of the Agricultural Adjustment Act and Sections 902, 906 and 907 of the Revenue Act of 1936 were enacted they had a vested right; that these Sections placed an impossible burden on them and deprived them of this right; and that said Sections are unconstitutional. In my opinion, all of these questions were decided adversely to plaintiffs in the case of United States v. Jefferson Electric Manufacturing Company, 291 U. S. 386.

[fol. 53] The Electric Company manufactured and sold in the open market ignition coils. The plaintiffs manufactured and sold in the open market cotton goods. The Electric Company bought in the open market iron, copper, coal and other things used in the manufacture of the coils. The plaintiffs bought in the open market cotton, coal, starch and other things used in the manufacture of cotton goods. Both used labor in manufacturing their products. The Electric Company paid a sales tax accruing when the goods were sold. The plaintiffs paid a processing tax accruing when cotton was opened for processing.

The taxes in both cases have been definitely ascertained. The sales price is definite. It is as easy in the one case as in the other to determine the costs of the finished product. That part of the tax paid by the seller of the raw material can be found by the use of a reasonable test time before, during and after the tax period.

With this information, it will be no more difficult to determine the amount of the tax passed on than in the Electric Company Case. The Court said in the Electric Company case:

"We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he are the actual sufferers and are the real parties in interest."

Orders will be made in conformity with this opinion.

David J. Davis, United States District Judge.

[fol. 54] In United States District Court for the Southern Division of the Northern District of Alabama

At Law. No. 4595

Anniston Manufacturing Company, a Corporation, Plaintiff,

v.

Harwell G. Davis, Individually and as Collector of Internal Revenue, Defendant

Order Sustaining Defendant's Demurrer—Filed July 6, 1936

This cause again coming on for hearing on this the 6 day of July, 1936, the Plaintiff requests leave to amend its complaint by separate paper filed herein, which amendment is hereby allowed.

Thereupon, the Defendant refiles his motion, as amended, to dismiss the complaint, as last amended, and the Court understanding said motion, as amended, denies and overrules the same, to which action of the Court the Defendant duly excepts, which exception is allowed;

Thereupon, the Defendant refiles his demurrer, as amended, and each ground thereof, as amended to each count, separately and severally, of the plaintiff's complaint, as last amended, and in addition thereto requests leave to amend said demurrer by separate paper filed herein on June 25, 1936, and also by separate paper this day filed, which amendments to said demurrer are hereby allowed.

The Court, being fully advised in the premises, is of the opinion that the Defendant's demurrer, as last amended, should be sustained, and it is, therefore, by the Court:

[fol. 55] Ordered, Adjudged and Decreed that the Defendant's demurrer, as last amended, be and the same is hereby sustained, to which ruling of the Court the Plaintiff excepts, which exception is hereby allowed;

And the Plaintiff declining to plead further, it is:

Ordered, Adjudged and Decreed by the Court that the Defendant go hence without day and recover of and from the Plaintiff his costs herein, for which execution may issue. Exception of Plaintiff allowed.

Done this 6 day of July, 1936.

David J. Davis, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed July 10, 1936

To the Honorable David J. Davis, Judge of the United States District Court for the Northern District of Alabama:

The above named Petitioner, Anniston Manufacturing Company, a corporation, considering itself aggrieved by the [fol. 56] judgment rendered and signed on July 6, 1936, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and it prays that this appeal may be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit under the rules of such court in such cases made and provided.

This 10th day of July, 1936.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Petitioner.

ORDER ALLOWING APPEAL

Upon due consideration of the foregoing petition for appeal, it is ordered that the appeal herein be allowed as prayed for, and it is further ordered that a certified transcript of the record and all proceedings be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit. It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars, to be approved by this Court.

This 10th day of Juply, 1936.

David J. Davis, United States Judge.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 10, 1936

Now comes the said Anniston Manufacturing Company, Plaintiff in the above cause, and files the following assignment of errors, upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this court entered on the 6th day of July, 1936.

1

The Court erred in sustaining Defendant's General Demurrer to the complaint as amended, and by deciding that the facts stated in the complaint as amended were not sufficient to constitute a cause of action.

2

The Court erred in rendering final judgment for the Defendant.

3

The Court erred in sustaining Defendant's Demurrer to the first count of the complaint as amended, and by de-
[fol. 58] ciding that the facts stated in said count were not sufficient to constitute a cause of action.

4

The Court erred in sustaining Defendant's Demurrer to the second count of the complaint as amended, and by deciding that the facts stated in said count were not sufficient to constitute a cause of action.

5

The Court erred in failing to hold that Sections 902, 903, 904, 906, 907 and 910 of the Revenue Act of 1936 (Public Law No. 740, 74th Congress) are unconstitutional and inapplicable for each of the reasons set forth in the amendment to the complaint herein filed and allowed on July 3, 1936.

Wherefore Plaintiff prays that said judgment may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated July 10th, 1936.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

Presented this July 10, 1936. David J. Davis, U. S. District Judge.

[fols. 59-61] Bond on appeal for $500.00, approved and filed July 10, 1936, omitted in printing.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 10, 1936

To the Clerk of the Above Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1

The original complaint filed in the office of the Clerk of the District Court on the 22nd day of November, 1935.

2

First amendment to complaint and order allowing same dated and filed on June 12, 1936.

3

[fol. 63] Second amendment to complaint and order allowing same, dated and filed on July 3rd, 1936.

4

Defendant's original demurrer filed on the 12th day of June, 1936.

5

Amendment to Defendant's demurrer filed on June 25, 1936, and allowed July 6, 1936.

6

Further Amendment to Defendant's Demurrer filed and allowed on July 6, 1936.

7

Opinion of the Court on demurrer filed July 6, 1936.

8

Order and judgment of the court made and entered on the 6th day of July, 1936.

9

Petition for appeal, with date of filing.

10

Order allowing appeal, with date of filing.

11

Assignment of errors, with date of filing.

12

Citation on appeal and acknowledgment of service thereon, with date of filing.

[fol. 64] 13

This præcipe with acknowledgment of service thereon, with date of filing.

14

Certificate of the Clerk to the correctness of the record as to præcipe.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

Due and legal service of the within and foregoing præcipe is hereby acknowledged, and all other and further service is hereby waived.

This 10th day of July, 1936.

Jim C. Smith, United States Attorney, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S PRÆCIPE FOR RECORD—Filed July 11, 1936

To the Clerk:

Please incorporate in the record, as Defendant's præcipe, the following, in addition to the præcipe of the Plaintiff:

[fol. 65] Motion to dismiss filed on April 22, 1936.

Amendment to said motion filed on June 12, 1936.

Any and all orders entered on or in connection with said motions.

The order of court entered on June 12, 1936.

This the 11th day of July, 1936.

Jim C. Smith, United States Attorney.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 19th, 1936

No. 8175

ANNISTON MANUFACTURING COMPANY, a Corporation,

versus

HARWELL G. DAVIS, Collector of Internal Revenue

On this day this cause was called, and, after argument by Joseph B. Brennan, Esq., and W. A. Sutherland, Esq., for appellant, and M. H. Eustace, Esq., Special Assistant to Attorney General, for appellee, was submitted to the Court.

[fol. 67] OPINION OF THE COURT—Filed January 8th, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8175

ANNISTON MANUFACTURING COMPANY, a Corporation, Appellant,

versus

HARWELL G. DAVIS, Collector of Internal Revenue, Appellee

No. 8186

LINCOLN MILLS OF ALABAMA, a Corporation, Appellant,

versus

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue for the District of Alabama, Appellee

Appeals from the District Court of the United States for the Northern District of Alabama

(January 8, 1937)

Before Foster, Hutcheson and Holmes, Circuit Judges

HUTCHESON, Circuit Judge:

Actions against the Collector for refunds of cotton processing and floor stock taxes, paid by appellants under

[fol. 68] the 1933 Agricultural Adjustment Act[1] these suits were brought before and heard on demurrers after the enactment of the Revenue Act of June 22, 1936,[2] This Act adopted and purportedly made adequate provision as to amounts collected under the Agricultural Adjustment Act for the administrative and judicial enforcement of the principle given authoritative sanction in United States vs. Jefferson Electric Co., 291 U. S. 386, that refunds of taxes illegally collected might properly be limited to those as to which the taxpayer could show that he bore the burden of the tax; that is, that the tax was really exacted from him, and not through him from others.

The Act in question makes comprehensive provisions to attain the end desired, that sums collected and paid out by the Government as taxes under Congressional sanction, to carry out a plan esteemed to be for the general welfare, should not be paid back to those who were merely conduits through which the stream of public contributions to the plan were poured into the Treasury. These are the controlling provisions of the Act as they are adequately summed up in the Government's brief:

"Sec. 644, provides that no refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid as tax under the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of the Commissioner or to the satisfaction of the trial court or Board, that he has borne the burden of such amount, or that he had repaid unconditionally such amount to his vendee who bore the burden thereof.

Section 645 provides that no refund shall be made or [fol. 69] allowed of any amount paid as tax under the Agricultural Adjustment Act unless after the enactment of this Act and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath."

Note 1. Title VII, U. S. C. A. Secs. 601, et seq.

Note 2. Making provisions for refund of amounts collected under the Agricultural Adjustment Act the new provisions, c. 690 Secs. 902 to 917, 49 Stat. 1747 to 1755 are included in Title VII, U. S. C. A. Sec. 644 to 659.

Section 646 provides that notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery • • • of • • • any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. This condition does not apply to amounts defined as processing tax by Section 913."

Section 647 confers jurisdiction upon the District Courts concurrent with the Court of Claims of all cases regardless of the amount involved, except suits for refund of amounts paid as processing tax, if they would otherwise have had jurisdiction except for the amount in controversy."

Subsection (a) of Section 648 provides that notwithstanding any other provision of law no suit or proceeding [fol. 70] for the recovery of any amount paid as processing tax, as defined by Section 913, whether brought before or after the date of enactment of the Act, shall be brought or maintained in any court except as provided in that section. Subsection (b) establishes in the Treasury Department a Board of Review, consisting of nine members designated by the Secretary of the Treasury, which is given exclusive jurisdiction to review the allowance or disallowance by the Commissioner of claims for refund of amounts paid as processing tax. Subsections (c) and (d) provide for the filing of petitions with the Board of Review, and for a full hearing, after notice, upon the merits of the taxpayer's claim. Proceedings before the Board of Review are open to the public, are to be conducted in accordance with such rules of practice, (other than rules of evidence) as the Board may prescribe, and are to be conducted with the rules of evidence applicable in the courts of equity of the District of Columbia. The Chairman is authorized to divide the Board into divisions (subsection (b)) and the hearing may be held before a division (subsection (d)). By subsection (e) The Board and its divisions are required to make writ-

ten findings of fact and a decision in each case. The findings and decision of a division become the findings and decision of the Board unless within thirty days the Chairman orders such findings and decision reviewed by the Board. Subsection (g) provides for review by the Circuit Court of Appeals and the Court of Appeals for the District of Columbia for errors of law upon petition of the taxpayer or the Commissioner. Further review by the Supreme Court upon certiorari is also authorized."

[fol. 71] Section 649 creates certain presumptions intended to simplify the proof required under Section 604 to establish the extent to which the claimant has borne the burden of the tax sought to be recovered. Under subsection (a) a showing that the "average margin" (as defined by the Act) per unit of commodity processed was lower during the tax period than it was during stated periods before and after the tax period creates a prima facie presumption that the claimant bore the burden of the tax, while a showing that the average margin during the tax period was not lower is made prima facie proof that the claimant did not bear the burden. By subsection (e) either the claimant or the Commissioner is permitted to rebut the presumption created by subsection (a) by showing the extent to which the claimant shifted the burden to others. The section further indicates certain matters which may be proved to overcome the presumption."

Section 652; provides that no Collector of Internal Revenue or Customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act or for the recovery of any amount so collected and paid into the Treasury in performance of his official duties under the provisions of such Act, or if such Collector or officer acted under the direction of the Secretary or other proper officer of the Government.

Thus it appears that as to processing taxes, the consent of the United States to be sued in the District Court is completely withdrawn. Such court review as is provided for as to these is in the Circuit Court of Appeals and the Supreme Court for errors of law. As to other tax refund claims still [fol. 72] suable in the District Court new and different prerequisites to suit are provided.

Neither of the appellants alleged conformity with the Act; indeed, both, setting it at naught, undertook to sue in spite of it. Responding to appellee's motions to dismiss for want of jurisdiction, and his demurrers to their petitions, that they stated no cause of action, each took the position that the Act was without effect as to causes of action, accrued and begun against the Collector before its passage.

This position was supported by rather feebly urging that the Act did not purport to, it did not, affect claims already accrued, and already in suit, and by urging firmly and with confidence, that if it did, it would be in violation of the due process clause of the Fifth Amendment, as depriving them of their vested right to sue the Collector for wrongs done them by him. The District Judge thought the Jefferson Electric Co. case controlling. He sustained defendant's demurrers, and plaintiffs declining to plead further, dismissed their actions. Both plaintiffs are here vigorously attacking his rulings and orders.

The arguments orally and in the briefs took wide range, but they all were concerned with, they came down at last to the power of the Congress to subject plaintiffs' claims to the refund provisions of the June 1936 Act. For it too plainly appeared to be contested, indeed, it was in effect conceded, that that Act was intended to, and if valid, did, prevent the maintenance of the suits plaintiffs had brought.

It is not claimed here, as indeed it could not be, that the Act was not effective to withdraw the consent of the United States to be claimed against and sued, and therefore all right to maintain a suit against it for refunds, except under and in strict accordance with the conditions the Act prescribes. Smallwood vs. Gallardo, 275 U. S. 56; Tucker vs. [fol. 73] Alexander, 275 U. S. 228; United States vs. Clark, 8 Pet. 436; Lynch vs. United States, 292 U. S. 571; Dismuke vs. United States, 297 U. S. 167; United States vs. Michel, 282 U. S. 917; The Collector vs. Hubbard, 12 Wall. 1; Cheatham vs. United States, 92 U. S. 85; Rock Island vs. United States, 254 U. S. 141; Arnson vs. Murphy, 115 U. S. 579; United States vs. Chicago Golf Club, 84 Fed. (2d) 914; Ritter vs. United States, 28 Fed. (2d) 265; United States vs. Jefferson Electric Co., supra; Continental Mills vs. United States, — Court of Claims —.

What is claimed and vigorously insisted on is (1) that independent of statutory consent, plaintiffs, before the Act

in question was passed, acquired a vested right against the Collector to hold him to account in a refund action of the kind they had instituted, and that Congress could not take this action away without providing for their use some substantial equivalent of it, and (2) that the right and remedy the Act gave was not only not an equivalent of the right taken away, but in effect a complete denial of it.

Appellee as vigorously espouses the negative of both propositions. He insists that the action appellants have brought is not a non-statutory action against him, indeed, is not truly an action against him at all. It is a kind of John Doe action allowed in part by statutory implication, in part by statutory direction, which, by an amiable fiction to take the place of formal consent, though in name against the Collector, is in substance and effect as to the amount sued for in it, against the United States. Being but a form of action for determining its obligation to refund, to which the United States has consented, it, like any other authorized form of action evidencing consent of the United States to be sued, may at any time be taken away by statute. Appellee takes vigorous issue too, with appellants' position that the provisions for refund the Act makes are intended [fol. 74] to keep the promise to the ear in the reading of them, only to break it to the hope in their working out; that they are intended, in short, to hold out specious, delusive and illusory promises by a tender of administrative machinery, which is so constructed, so geared and so operated as certainly to enmesh and destroy every claim run through it.

The burden of appellants' complaints against the Act and its operation, as it seeks to condition refunds upon proof of its actual burdensomeness to claimants, is that throwing an impossible burden on them, it requires the impossible in proof. They insist that as applied to the business they are in, and the commodities they have handled, to require claimants to establish that they, and they alone, have finally borne the burden of the exactions, is to require the proof of a negative which absolutely cannot be proven, is to in effect fix such conditions upon the refund that its denial is necessarily predetermined.

As to the taxes in question, they have pleaded and they vigorously affirm in their argument that it is not possible to determine whether the taxes were or were not passed on

to others, that is, collected in the sales prices. If included at all, they were, they say, so buried in the price along with other invisible and indivisible elements of cost, that it is impossible to disentangle them and to precisely say where their burden fell. This must not be the case, they say, when refund is denied on the ground that the claimant should not have back moneys which he paid into the Treasury not as exactions from himself, but as collections from others. They point too, to the provisions in the Act as to presumptions and as to procedure, and they say, these are but devices to make more certain the impossibility of proof, and thus to insure, what they declare the purpose of the Act to be, that refunds will not be permitted but prevented.

[fol. 75] Appellee denies this. He insists that though the task is difficult, it is not impossible; though the obstacles in the way of the refund are great, they are not insuperable. He urges at last that they are no more or more onerous than considerations of natural justice and equity require, of one who having conducted its business under a plan and scheme, the purpose and effect of which is to raise the level of farm prices and therefore necessarily of prices all along the line, and having in effect like others in the business were, been constituted a potential tax gatherer and collector through higher prices, to pass the taxes on to, and to collect them from, and pay them for, others into the Treasury, attempts to recover back for itself the sums it paid in.

He insists that the least that should be required of it is to show that though it was expected of it and others similarly situated, that they would pass these taxes on to the general public, and though this was the common and general practice, it did not in fact do so, but itself sustained the burden the general public had been expected to, and generally did bear. He argues that so clearly was it understood, indeed, intended, that in the commercial practices under the Act, the taxes would be distributively passed on, and so generally was this in fact done, that Congress, upon a clear legislative declaration that the passing on was wellnigh universal, might have made the presumptions more vigorous, the conditions of proof before refunds more rigorous and exacting.

Appellee invokes as completely apposite in principle and in application, and therefore controlling as authority, the

refund provisions of the 1928 Act, denying refunds except to those who could prove that they had not passed illegally collected taxes on, as it is approved and discussed in the Jefferson Electric Co. case, supra. They cite also as having bearing here Richardson Lubricating Co. vs. Kinney, [fol. 76] 168 N. E. 886; Standard Oil Co. vs. Bollinger, 169 N. E. 236; and the host of cases denying recovery in tax cases, where to allow it would result in unjust enrichment. Typical of these are Bull vs. United States, 295 U. S. 247; Champ Springs Co. vs. United States, 47 Fed. (2d) 1; Rose vs. McEachern, — Fed. (2d) —.

Appellants insist that the Jefferson Electric case is not authority here, for there, they say, the refund claimant was but a tax gatherer in law and in fact, to gather sales taxes from customers, who were expected to and did pay them, and it was therefore within Congressional competence to provide that having collected the tax from another, he should not obtain a refund for himself. This, they say, is sound doctrine applying in and limited to sales tax cases. Wayne Co. Products Co. vs. Duffy, 155 N. E. 669; Lash's Products Co. vs. United States, 278 U. S. 175.

Interesting as these questions and discussions are, important and farreaching as to tax refunds, as is the principle the Jefferson Electric Company case lays down, desirable as it might be to have the limits of the principle and of the conditions under which it may be applied laid down, we are persuaded that we should not enter upon either a discussion or a decision of them. For we are convinced that appellants have failed to establish their first point, to which the second, which they and appellee so fully discuss, is completely subordinate, that the suits they seek to maintain are really personal suits against the defendant, at common law, to enforce vested rights against him as an individual, and not suits against the United States, consented to by it through the fiction of a suit against the Collector. We are convinced that whatever actions appellants might conceivably have brought or bring against appellee, those they have actually brought against him are not personal, common law actions for moneys had and received, which they [fol. 77] expect him personally to respond to, but precise, statutory actions for refunds from the Treasury in which appellee is not a real, but only a nominal or fictional defendant. The responsibility for the judgment, if obtained,

will not be appellee's. No one, least of all either of the appellants, expects the judgment if obtained, to be really against and to be really satisfied by him. The appellants know that appellee cannot respond to such judgments as they seek, they do not expect him to. Because they know this, and are really looking to the Treasury, they here plead conformity to all the statutory requirements applicable generally to tax refunds. Particularly do they plead that they have filed and prosecuted claims with the Commissioner, and that the Commissioner has finally rejected them. They are looking for satisfaction to the United States. They rely for such satisfaction upon its statutes, providing that the United States shall satisfy judgments against the Collector when obtained for or on account of actions done by him, pursuant to his office.

An examination of the pleadings will show beyond question that this is true. It will show that the cause of action asserted is not a common law action, for moneys had and received, based, as such actions must be, on wrongful seizures and detentions of plaintiffs' moneys by defendant. None of the elements which enter into and condition that action are here present. If then, the actions are to be taken as intended to be personal, common law actions, to be responded to personally by appellee, and not as statutory ones against, and to be responded to by the United States, through the Collector as proxy, the petitions are completely demurrable. But they were not so intended.

In Lincoln's case no effort was made to plead any of the elements of a common law action. It is not claimed that the defendant had money in his hands which he had gotten [fol. 78] from plaintiff, not in pursuance of his duties, but wrongfully, and is withholding from it under circumstances which make it inequitable for him to continue to do so. It is not even pleaded that the moneys plaintiff paid him were paid under duress and protest, and therefore not voluntarily. This is an essential condition to a common law action against the Collector independent of statute, for moneys had and received. Elliott vs. Swartwout, 10 Pet. 137; Cary vs. Curtis, 3 How. 325 and until 1924 it was to the statutory action against him, Moore Ice Cream Co. vs. Rose, 289 U. S. 375; Field, The Effect of an Unconstitutional Statute, p. 251 and cases; State vs. Canfield, 171 N. E. 111; People vs. Ventura, 268 Pac. 347. On the con-

trary, it is pleaded that the moneys were paid over to and collected by appellee in pursuance of his duty to collect them.

Anniston's case was pleaded the same way, until by its amendment, filed June 12, 1936, it alleged without pleading any facts but merely as a conclusion that nearly all of the sums it had paid were paid under duress and protest. But these allegations, are not sufficient to convert the suit, Anniston brought, from the statutory action for refund, allowed by the Congress, to a common law action for moneys had and received independent of statutory grant. For the case is framed as an action for refund. It is definitely pleaded that a claim for refund was made not to the Collector, but to the Commissioner. It is insisted that every step, on which appellant relies, in the statutory refunding process had been gone through to the point of suit. And in its brief appellant makes it more clear that the suit was, in reality not against the appellee, but against the United States, by pointing to the statute 26 U. S. C. A. Sec. 1670(b) authorizing the Commissioner to repay the Collector the full amount of moneys recovered against him in any court for any Internal Revenue taxes collected by him, as well as to 28 U. S. C. A. Sec. 842 providing that upon the giving of [fol. 79] a certificate of probable cause no execution shall issue against the Collector on any judgment against him for moneys he had collected, but the amount so recovered shall be paid out of the Treasury.

In view of the suits plaintiffs have actually brought, and of the state of the authorities as to such suits, the briefs are full of what seems little better than quibbling over whether their actions are common law actions, with statutory limitations, or purely statutory ones. We think it may not be doubted that the whole current of authority is to the effect that the actions they have brought are given by statute, and may not, except in accordance with statutory consent, be maintained. Cary vs. Curtis, 3 How. 235; Barney vs. Watson, 92 U. S. 449; Arnson vs. Murphy, 109 U. S. 238; 115 U. S. 580; Cheatham vs. United States, 92 U. S. 85; Moore Ice Cream Co. vs. Rose, 289 U. S. 373; Rose vs. McEachern, supra.

In Schoenfeld vs. Hendricks, 152 U. S. 693, it is said:

"It was decided by this court in Arnson vs. Murphy, 109 U. S. 238, that the common law right of action against a col-

lector to recover duties illegally collected was taken away by act of Congress, and a statutory remedy given, which was exclusive."

Expressions in Smietanka vs. Indiana Steel Co., 257 U. S. 1; Sage vs. United States, 250 U. S. 33; Graham & Foster vs. Goodcell, 282 U. S. 409; White vs. Hopkins, 51 Fed. (2d) 159; Tait vs. Western Md. Ry., 289 U. S. 620, relied on by appellants as declaring the law to be of a different purport, do not do so. They must be read as applied to the situations specifically dealt with under those decisions and the matters decided in them. They did not purport to deal with the question at issue here, whether the action against the collector for collections made officially would lie at common law independent of the Congressional consent evidenced [fol. 80] by statute. They may not be distorted into an overruling of the long line of cases beginning with Elliott vs. Swartwout, which discuss and point the difference between a common law action against the collector for his wrongful conduct, and the statutory action allowed against him, and through him against the United States, for doing what the law commands, or appears to command, him to do. c/f DeLima vs. Bidwell, 182 U. S. at 177.

It is perfectly plain that appellants have not plead, we think they cannot plead, a common law, indeed without the aid of Congress any action, against appellee. For, as shown at length in the Swartwout and Curtis cases, appellee has done them no actionable wrong. A collector of internal revenue, obligated by statute to collect taxes and pay them daily over to the Treasury, he has done no wrong in doing so, for which an action, equitable in its nature, like that for moneys had and received, will lie against him. The statute is his master, it is likewise his protection and shield. It directs him to collect and pay over; it protects him when he does so. The law, in the absence of a statute giving one, will raise no cause of action against him in favor of those who, like appellants, knowing that moneys were being collected by him officially, paid it over to him and continued to conduct their business under the conditions and on the basis created by the imposition of the tax, without at least requiring them to show, not merely that they paid the moneys to him, but that in doing so they have suffered a real injury. In the absence of such showing, when the collector has paid the money over as the law requires, the equities are

with, rather than against him, and except by statutory consent he may not be sued. Cary vs. Curtis, Schoenfeld vs. Hendricks, DeLima vs. Bidwell, supra, Field, Recovery of Unconstitutional Taxes, pp. 253-4-5.

But, say the appellants, our right of action springs from the fact, our action asserts, that the purported law under [fol. 81] which appellee proceeded was unconstitutional. It was therefore no law, and appellee was a trespasser ab initio, without legal protection or authority. In support of their general proposition that an unconstitutional law is no law, they quote from Norton vs. Shelby County, 118 U. S. 425, at p. 442:

"An unconstitutional act is not a law. It confers no rights; it imposes no duties; it offers no protection, it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

But like every other legislative phrase coined arguendo in the process of decision, this phrase leaves something to be desired, when it is lifted from its argumentative setting to be converted into a general legal canon on, indeed, almost a part of, the Constitution itself. When it is attempted, as here, to be given such wide application as not merely to strike down an exaction so that it cannot thereafter be collected, but to support a common law action against a collector for moneys collected and paid into the Treasury by him under color of the law, and as a part of his official duties before the law was declared unconstitutional, it is well to call attention to exactly what was decided in that case, and to the fact that there is abundant authority to the contrary of the position appellants take.

In Norton's case the unconstitutionality went to the existence of the office itself. All that was actually decided there was "there can be no incumbent de facto of an office, if there be no office to fill." United States vs. Royer, 268 U. S. 397. Here the collector's office is not in question. The decision in United States vs. Butler, 297 U. S. 110, that the Agricultural Adjustment Act was unconstitutional did indeed, as declared in Rickert Rice Mills vs. Fontenot, place collectors who should thereafter attempt to collect the tax in [fol. 82] the position of trespassers. That decision did not, nor did that in the Rickert case, declare that as to the collections made in the course of their official duties under that

act before its unconstitutionality was declared, collectors would be liable other than as provided by statute. It may be that if a Congressional Act is on its face so arbitrary and unreasonable, so beyond power, and so violative of natural rights as that any reasonable person must know its invalidity, persons acting under it before its unconstitutionality has been declared will not be protected from a personal accounting. When, however, as in this case, the unconstitutionality of the law was far from plain, no common law action will be raised, we think, against collectors who, before its unconstitutionality has been searched out and declared, have, by virtue of their office collected money and paid it over. Wendt vs. Berry, 154 Ky. 586; State vs. Poulin, 74 Atl. 119, 24 L. R. A. (N. S.) 408 and Note; Lang vs. Bayronne, 68 Atl. 90, 15 L. R. A. (N. S.) 93 and Note; Cooley, Constitutional Limitations, 8 Ed. Vol. 1 page 382 and Note; Field, The Effect of an Unconstitutional Statute, Introduction, pp. 3 to 13, incl. — pp. 251, 252. C/f Miller vs. Standard Nut Margerine Co., 284 U. S. 498; Rickert Rice Mills vs. Fontenot, 297 U. S. 110, as to the effect upon the right to an injunction of judicially declared illegality and unconstitutionality. We think it quite plain that neither appellant showed any right to sue, and that the judgments of dismissal must be affirmed.

We think, however, the weakness of their cases as they have brought them, statutory actions for refund, goes deeper than their mere failure to state a cause of action. Statutory consent to sue the collector in a refund action having been withdrawn, the Court was without jurisdiction to entertain the suits.

The judgments of dismissal are therefore affirmed, not because the pleadings were subject to demurrer, but because consent to bring a refund suit against the collector having [fol. 83] been withdrawn, there was no jurisdiction in the court below to entertain the actions.

Affirmed.

[fol. 84] JUDGMENT

Extract from the Minutes of January 8th, 1937

No. 8175

ANNISTON MANUFACTURING COMPANY, a Corporation,

versus

HARWELL G. DAVIS, Collector of Internal Revenue

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 85] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 66 to 84 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8175, wherein Anniston Manufacturing Company, a corporation is appellant, and Harwell G. Davis, Collector of Internal Revenue is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 65 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 8th day of January, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,207. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 667. Anniston Manufacturing Company, petitioner, vs. Harwell G. Davis, Collector of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed January 21, 1937. Term No. 667, O. T., 1936.

(8756-C)

FILED
JAN 21 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petition.

Anniston Manufacturing Company, a corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above case on January 8, 1937 (R. 79), affirming the judgment of the United States District Court for the Northern District of Alabama (R. 54).

Questions Presented.

(1) Whether the provisions of Title VII of the Revenue Act of 1936 are constitutional and operative in so far as

they attempt to restrict or defeat Petitioner's vested right of action against a collector of internal revenue for the recovery of amounts exacted from the petitioner by the collector as taxes under the unconstitutional Agricultural Adjustment Act.

(2) Whether Sections 906 and 910 of the Revenue Act of 1936 are void under the due process clause of the Fifth Amendment as attempting to destroy petitioner's vested right of action against the collector of internal revenue personally for the recovery back of amounts wrongfully exacted under the Agricultural Adjustment Act.

(3) Whether petitioner can maintain this action without alleging compliance with the conditions imposed by Section 902 of the Revenue Act of 1936.

(4) Whether Section 902 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment:

(a) In that it attempts to impair Petitioner's vested right to recover amounts exacted from it under the Agricultural Adjustment Act by attaching to such right conditions that have no legal, equitable or moral basis, even assuming that they involve no impossibility of proof.

(b) In that it attempts to impair and destroy Petitioner's vested right to recover amounts exacted under an unconstitutional statute by retroactively imposing conditions involving an inherent impossibility of proof.

(c) In that it arbitrarily and unreasonably shifts to Petitioner the burden of proof with respect to the matters there described.

(d) In that it is so vague, uncertain and indefinite that claimants cannot know what proof it requires.

(5) Whether Section 902 of the Revenue Act of 1936 is void under the doctrine of the separation of powers as being so vague and uncertain that the courts cannot give it any definite construction without legislating.

(6) Whether Section 906 is void under the due process clause of the Fifth Amendment:

(a) In that it fails to provide even a fair administrative remedy for the wrongful collection of amounts as taxes under the Agricultural Adjustment Act.

(b) In that it denies all effective judicial remedy for the wrongful collection of amounts as taxes under an unconstitutional statute.

(7) Whether Section 907 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment as creating a presumption which is arbitrary and unreasonable.

(8) Whether Sections 903, 904 and 906 of the Revenue Act of 1936 fall as being simply adjuncts to, and inseparably connected with, the essential and unconstitutional provisions of Section 902 and other parts of Title VII.

Statutes Involved.

The pertinent provisions of Title VII of the Revenue Act of 1936 (Act of June 22, 1936, c. 690, Secs. 901 et seq.), entitled "Refunds of Amounts Collected under the Agricultural Adjustment Act" (7 U. S. C. A., Secs. 644-659) are set forth in the Appendix, *infra*. There are also set forth in the Appendix the provisions of Sections 3220 and 3226 of the Revised Statutes as amended.

Statement.

This action was brought by petitioner for the recovery of approximately $270,000.00 which Respondent, a collector of internal revenue, had collected from petitioner as floor stock and processing taxes under the purported authority of the Agricultural Adjustment Act,[1] which was held unconstitutional in *United States* v. *Butler*, 297 U. S. 1. The District Court sustained respondent's general demurrer and dismissed the amended complaint (R. 54), and this judgment was affirmed by the Circuit Court of Appeals (R. 79).

It is alleged in the amended complaint that all of the amounts in controversy were paid by petitioner to respondent under duress and that at the time of making all of said payments (except the first three, involving less than $8,000.00), petitioner protested to Respondent that said taxes were illegal and unconstitutional (R. 25). The complaint also alleges that claims for refund had been filed with respondent on the ground that the Agricultural Adjustment Act was unconstitutional and said taxes were illegal by reason of several provisions of the Constitution, including the Tenth Amendment (R. 5, 7, 14, 16). It is alleged further that the claims were rejected by the Commissioner prior to suit (R. 5, 14).

It is undisputed that as the law stood at the time petitioner's claims were rejected, petitioner was entitled to recover upon the basis of the allegations in the complaint. However, in his amended demurrer, respondent relied for a defense upon the provisions of Title VII of the Revenue Act of 1936, which was passed after the cause of action arose and after the suit was commenced.

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[1] Act of May 12, 1933, c. 25, Title I, 48 Stat. 31, 7 U. S. C. A. Secs. 601 *et seq.*

Section 902 of that Act provides in general that no refund shall be allowed of any amount collected as tax under the Agricultural Adjustment Act unless the claimant establishes that he bore the burden of such amount and has not shifted such burden, directly or indirectly, through inclusion in the price of articles claimant sells, through reduction of the price paid for the unprocessed commodity, "or in any manner whatsoever."

Section 903 requires the filing of new claims for refund, after the passage of the 1936 Act. Section 904 provides that no suit shall be brought to recover amounts collected as floor stock or compensating taxes under the Agricultural Adjustment Act, before the expiration of 18 months after a claim is filed under Title VII. Section 906 prohibits the maintenance of suits or proceedings to recover amounts collected as processing taxes, except as provided in Section 906. That section goes on to create a Board of Review in the Treasury Department, before which claims for refund of processing taxes may be prosecuted. Provision is made for review of the Board's decisions in the Circuit Court of Appeals and for review by this Court of the judgments of such courts on writ of certiorari. Section 907 establishes a statutory presumption for determining the extent of "shifting," based solely upon a comparison of manufacturing margins during the tax period and during a specified comparative period.

Section 910 provides that no collector of internal revenue shall be in any way liable for any act done by him under the Agricultural Adjustment Act in the performance of his official duties under the provisions of such Act.

In sustaining Respondent's general demurrer the District Court upheld the validity of Title VII upon the authority of *United States* v. *Jefferson Electric Company*, 291 U. S. 386. The Circuit Court of Appeals affirmed the

judgment of the District Court on other grounds, and expressly stated that under its view it was unnecessary to consider the effect of the decision of this Court in the *Jefferson Electric Company* case. The Circuit Court of Appeals held that this action is a suit against the United States originally "consented to by it through the fiction of a suit against the Collector" (R. 73). It held further that Congress, in the exercise of sovereign immunity to suit, had withdrawn consent to suits of this kind, and that this withdrawal was effective to cut down vested rights of action based upon the collector's exaction of money under an unconstitutional statute, *even if no substituted remedy was provided* (R. 78, 73-75). The learned Circuit Judge further held that, except by provision of statute, no right of action could have arisen against the collector for the wrongful exaction from petitioner of money under the unconstitutional Agricultural Adjustment Act for the reason that the unconstitutionality of the Act was "far from plain" and had not been searched out and declared at the time of the collections here in question (R. 75-78).

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has held that the sovereign immunity of the United States can be extended so as to protect an officer from personal liability with respect to damage done by said officer while purporting to act under an unconstitutional statute. In so holding, the Circuit Court of Appeals has decided a most important constitutional question in a way clearly in conflict with the decisions of this Court in *Poindexter* v. *Greenhow*, 114 U. S. 270; *Atchison T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642; *Scott* v. *Donald*, 165 U. S. 58; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 81. This Court has always considered that the principle

relied upon by the court below is repugnant to the fundamental principles of our constitutional system.

2. The Circuit Court of Appeals has held that all effective remedy both against the United States and the Collector for the wrongful exaction of money under purported authority of an unconstitutional statute may be destroyed by Congress consistently with due process of law. In so holding, the Circuit Court of Appeals decided an important constitutional question in a way in conflict with the decisions of this Court in *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Graham* v. *Goodcell*, 282 U. S. 409; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17, which held that some effective remedy must be afforded with reference to the illegal exaction of taxes.

3. In holding that this action is against the United States and not against the collector personally, the Circuit Court of Appeals has decided an important Federal question in a way clearly in conflict with the decisions of this Court in *Sage* v. *United States*, 250 U. S. 33; *Graham* v. *Goodcell*, 282 U. S. 409; *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 5; *Patton* v. *Brady*, 184 U. S. 608.

4. The Circuit Court of Appeals has misconstrued and misapplied the decisions of this Court in *Cary* v. *Curtis*, 3 How. 236; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373; *Arnson* v. *Murphy*, 109 U. S. 238, 115 U. S. 579; *Cheatham* v. *United States*, 92 U. S. 85; *Schoenfeld* v. *Hendricks*, 152 U. S. 691.[2]

5. The decision of the court below is not in harmony with the decisions of this Court in *Ettor* v. *Tacoma*, 228 U. S. 148, 156, and *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall.

[2] These cases are discussed under point 3 of the brief, *infra*.

450, 457, 458. In addition to relying upon the doctrine of sovereign immunity, the court below impliedly assumed that the petitioner's right of action was a statutory and not a common law right, and that for this reason also it could be divested.[3] This Court held in the cases cited that vested rights of action, although based upon statutes, cannot be divested consistently with due process of law.

6. The questions presented in this case are questions of constitutional law and of the utmost public importance. The urgent necessity and public importance of an early decision of these questions are discussed fully in the Supporting Brief.

7. The decision of the Circuit Court of Appeals is in conflict with the decisions of District Courts in two other circuits. *Charles W. Priddy & Co.* v. *Early* (E. D. Va.), unofficially reported in 1936 C. C. H. Par. 9495; *Cudahy Bros. Co.* v. *Budde* (W. D. Wis.), decided December 7, 1936, not yet reported. In the first of the cited cases; the collector's appeal is pending in the Circuit Court of Appeals for the Fourth Circuit. Three other similar cases have been decided against the taxpayers. *Butler* v. *Carney* (D. Mass.), unofficially reported in 1936 C. C. H., Par. 9526; *Edwin Cigar Co.* v. *Higgins* (S. D. N. Y.), unofficially reported in 1937 C. C. H., Par. 9013; *Sheridan Flouring Mills* v. *Cassidy* (D. Wyo.), decided January 11, 1937, not yet reported. The case of *Butler* v. *Carney, supra,* is pending on appeal in the Circuit Court of Appeals for the First Circuit, and the case of *Edwin Cigar Co.* v. *Higgins, supra,* is pending

[3] Petitioner contends that the action is a common law action modified by statute (see *Sage* v. *United States*, 250 U. S. 33), but the result would be the same under this Court's decisions even though the right were purely statutory. The right of action having once arisen, the fact that it had its origin in a statute does not deprive it of constitutional protection.

on appeal in the Circuit Court of Appeals for the Second Circuit.[4]

WHEREFORE it is respectfully prayed that the petition be granted.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Counsel for Petitioner.

January, 1937.

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[4] Assuming that Title VII is properly to be construed as an assertion of sovereign immunity to suit, processing tax suits against the United States involve fundamentally different questions from those involved in suits against collectors. Two processing tax suits against the United States have been decided by courts of first instance in favor of the Government. *Continental Mills* v. *United States* (Ct. Cls.), decided December 7, 1936, certiorari denied by this Court, January 4, 1937; *Barlow-Moore Tobacco Co.* v. *United States* (W. D. Ky.), decided December 12, 1936, pending here as No. 576, on petition for certiorari. The record in the first of the cited cases indicates that it was argued and submitted to the Court of Claims before the 1936 Act was passed. In the second case the petition was filed before hearing in the Circuit Court of Appeals. *Cf. Marshall Field & Co., Inc.*, v. *United States* (Customs Court), unofficially reported in 1937 C. C. H., Par. 9019, decided in favor of the taxpayer.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court for the Northern District of Alabama in the present and similar cases is reported in 15 F. Supp. 257, under the name of *Lincoln Mills of Alabama* v. *Davis* (R. 51-53). The opinion of the Circuit Court of Appeals has not yet been reported, but will be found at page 66 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on January 8, 1937 (R. 79). Jurisdiction to issue the writ requested is found in the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented, Statutes Involved, etc.

A statement of the questions presented and a statement of the case will be found in the petition. The statutes involved appear in the Appendix.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that Congress can, consistently with the due process clause of the Fifth Amendment, destroy a taxpayer's vested right of action to recover from a collector amounts collected as taxes under an unconstitutional statute without affording any other remedy.

2. In holding that this action was not against the collector, personally, but was in reality an action against the United States.

3. In holding that the District Court was without jurisdiction to entertain this action.

4. In failing to hold that the provisions of Title VII violate the due process clause of the Fifth Amendment in attempting to restrict and defeat petitioner's action against a collector for the recovery of amounts exacted as taxes under the unconstitutional Agricultural Adjustment Act.

5. In failing to hold that Section 902 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment as impairing petitioner's right to a refund.

6. In failing to hold that Section 902 is void under the constitutional doctrine of the separation of powers in that it is so vague, uncertain and ambiguous that an attempt by the courts to give it a definite construction would require the courts to legislate.

7. In failing to hold that the procedural provisions (Sections 903, 904 and 906) of Title VII are inseparably connected with Section 902 and therefore fall with that section.

8. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying any effective judicial remedy for the collection of an unconstitutional tax.

9. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying a fair and effective administrative remedy for the collection of an unconstitutional tax.

10. In affirming the judgment of the District Court.

ARGUMENT.

1. The Scope of the Lower Court's Application of the Doctrine of Sovereign Immunity.

Relying on the doctrine of sovereign immunity and holding that such immunity to suit may be extended to an officer acting under an unconstitutional statute, the court below held that Title VII of the Revenue Act of 1936 is valid, even if the effect of Title VII is to leave those who paid processing taxes *without any remedy whatsoever* for the recovery of the unconstitutional taxes. That such is the plain import of the Court's decision cannot be doubted, for the Court clearly held that the pre-existing remedies were lawfully destroyed by Title VII, and at the same time expressly stated that it found it unnecessary to consider whether any genuine substitute remedy was provided or whether Title VII is justified under the rule laid down in *United States* v. *Jefferson Electric Company*, 291 U. S. 386.

The court below has thus held that taxpayers from whom unconstitutional taxes have been collected are entitled only to such remedy as Congress may voluntarily elect to give them, even as against the officer committing the wrong, and that Congress may lawfully and without any justification fail to provide them with any remedy whatsoever. This holding of the court below propounds a new and unprecedented rule of law which far transcends in significance and importance the matter immediately in hand. If the decision of the court below is correct and if the principles therein decided are established as the law of the United States, their operation and effect will be a matter of the gravest importance long after processing taxes and Title VII have become history.

On no theory is it possible to justify the taking away of all remedy from a citizen whose rights have been injured by

an officer of the United States acting under an unconstitutional statute. Such withdrawal of all remedy cannot be justified under the doctrine of sovereign immunity. Granting that sovereign immunity may be claimed by the United States in its own behalf at will and without restriction, it is entirely clear that sovereign immunity may not be extended to protect also the officer who committed the wrong, since if this were done the citizen whose constitutional rights were invaded would be left without any remedy. The importance of the distinction was recognized by this Court in *Poindexter* v. *Greenhow*, 114 U. S. 270, where the Court said (p. 291):

> "This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people, from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State—to say 'L'Etat, c'est moi'. Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. • • •"

In *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673, this Court recognized the importance of the rule that a taxpayer whose constitutional rights have been invaded cannot lawfully be deprived of all remedy, this Court saying (p. 682):

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In *Graham* v. *Goodcell*, 282 U. S. 409, this Court approved the principle of the *Brinkerhoff-Faris T. & S. Co.* case, *supra*, as applied to the Federal Government and its officers, saying (p. 430):

> "If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See Brinkerhoff-Faris Trust & Sav. Co. *v.* Hill, 281 U. S. 673, 679, 680."

The decision of the court below is in direct conflict with the decisions of this Court which have just been cited and with the other decisions of this Court which are cited under the first and second reasons for granting the writ, as set forth in the petition for certiorari. The decision of the court below is not only in conflict with the decisions of this Court, but it also involves questions of Federal law and of constitutional law of the gravest and most far-reaching public importance.

2. Personal Nature of Actions Against Collectors of Internal Revenue.

The court below held that this is not an action against the Collector of Internal Revenue personally, that the Collector is "not a real, but only a nominal or fictional Defendant", and that the United States is the real Defendant in the action (R. 76, 77). This holding is in clear conflict with numerous decisions of this Court.

In *Sage* v. *United States*, 250 U. S. 33, this Court held that a judgment against a collector of internal revenue for a partial refund is not a bar to a subsequent suit against the United States in the Court of Claims for the residue of such tax, since the United States was not a party to the first suit. In reaching this result Mr. Justice Holmes considered all the suggestions which may be urged as to the non-personal character of the action against a collector for a refund of taxes. In writing the opinion of the court he says (pp. 36-37):

> "It is true that the statutes modify the common-law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit (Rev. Stat. Sec. 3226) * * *. The suit is personal, and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in Minnesota *v.* Hitchcock, 185 U. S. 373, 388. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself."

The principle of the *Sage* case has been recently applied by this Court in *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308.

In *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, it was held that an action could not be maintained against the successor in office of a collector of internal revenue who had collected excessive and illegal taxes. In that case Mr. Justice Holmes, writing the opinion of the court, again repudiated the suggestion that the statutes created a new statutory liability attached to the office of the collector, who it was urged, was simply a formal defendant. The Court there said (p. 5):

> "In Patton *v.* Brady, 184 U. S. 608, a suit against a collector, * * * it was held that it could be revived against his executrix, which shows again that the action is personal; as also does the fact that the collector may be held liable for interest. Erskine *v.* Van Arsdale, 15 Wall. 75; Redfield *v.* Bartels, 139 U. S. 694."

In *Graham* v. *Goodcell, supra,* this Court had for consideration the constitutionality of Section 611 of the Revenue Act of 1928, a curative statute whereby Congress undertook to ratify certain unauthorized and illegal collections of internal revenue taxes. The Court held that the particular statute involved in *Graham* v. *Goodcell* was valid as a curative statute.[5] However, the Government had made the argument that Section 611 could be upheld as a withdrawal by Congress of the consent of the United States to be sued.

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[5] The particular statute involved in *Graham* v. *Goodcell* was held valid as a curative statute upon principles of legislative ratification. Section 21(b) of the Agricultural Adjustment Act which was added by the amendatory act of August 24, 1935, undertook to legalize or ratify collection of the processing taxes upon principles similar to those applied in *Graham* v. *Goodcell*. This Court held that the attempt to legalize processing taxes could have no effect in view of the lack of congressional power to impose the taxes in the first instance. *United States* v. *Butler et al.*, 297 U. S. 1, 78; *Rickert Rice Mills, Inc.*, v. *Fontenot*, 297 U. S. 110, 113.

This contention of the Government was repudiated by this Court in the following language (282 U. S. at p. 430):

> "The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. • • • If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See Brinkerhoff-Faris Trust & Sav. Co. *v.* Hill, 281 U. S. 673, 679, 680."

3. Decisions of This Court Erroneously Relied Upon by the Circuit Court of Appeals to Sustain Its Decision.

In support of its holding that an action against a collector of internal revenue to recover amounts illegally collected as taxes is a purely statutory action which cannot be maintained without statutory consent, and that Congress may at any time withdraw that consent so as to defeat such causes of action, even after they have arisen, the Circuit Court of Appeals cites the following decisions of this Court: *Cary* v. *Curtis*, 3 How. 236; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373; *Arnson* v. *Murphy*, 109 U. S. 238; *Cheatham* v. *United States*, 92 U. S. 85; *Schoenfeld* v. *Hendricks*, 152 U. S. 691. It is submitted that none of these cases is authority for the lower court's holding, and that the court below has misconstrued and misapplied them.

The case of *Cary* v. *Curtis*, *supra*, is clearly distinguishable from the present case. The court in that case pointed out that the effect of the statute there involved was simply to make the particular form of action (for money had and

received) inapplicable, and that other judicial remedies (replevin, detinue and trover) were left open to the persons affected by the statute (3 How. at p. 250). Thus this Court did not hold in *Cary* v. *Curtis*, as the court below has held in the present case, that the taxpayers may be left without any remedy. Also, the statute involved in *Cary* v. *Curtis*, unlike Title VII, was not applied retroactively so as to affect any previously vested right of action against a collector, and the court relied upon the fact that the statute was prospective in operation, and served as "notice to everyone" (3 How. at p. 241).

In the case of *Moore Ice Cream Co.* v. *Rose*, *supra*, on which the Circuit Court of Appeals relied, this Court held that Congress could *enlarge the collector's liability* for illegal collections by giving taxpayers a right of action, even where payments were not made under protest. Under the circumstances of that case it was apparent from the record that the collector would be indemnified by the Government, and could therefore suffer no loss. Consequently, he was not entitled to raise any question of the taking of property from him without due process. Neither the decision nor the reasoning of this Court supports the conclusion of the Circuit Court of Appeals here, or even suggests that a right of action against a collector for a wrongful collection could be taken away and no adequate remedy substituted.

In *Cheatham* v. *United States*, *supra*, also relied upon in the court below, it was asserted that Congress could require previous appeal to the Commissioner of Internal Revenue as a condition precedent to a suit against a collector for an erroneous collection. Such procedural regulations are of course reasonable, and, unlike Title VII, do not in any way impair or destroy the taxpayer's right of action. Cf. *Jones* v. *Union Guano Co.*, 264 U. S. 171.

In none of the other cases relied upon by the court below was the taxpayer deprived of all effective remedy.

4. The Public Importance and Need for an Early Decision.

The great public importance of the questions involved here is indicated from the fact that processing taxes were illegally collected from 73,000 taxpayers, and floor stock taxes from many more.[6] Any claims for refund to be filed by these taxpayers under Title VII must be filed prior to July 1, 1937, and it is provided in Section 903 that all evidence relied upon in support of such claims shall be clearly set forth. An attempt, however futile, to supply this evidence will immediately involve large expense. Administrative machinery will be necessary, under the requirements of the Act, to pass upon the issue of "shifting" in these cases. The Processing Tax Board of Review has been set up in the Treasury as provided in Section 906 and rules have been promulgated by the Board.[7] The tremendous expense of proceeding with these steps will be altogether unnecessary if, as we contend, Title VII as a whole is unconstitutional.

An early decision of the questions here involved is most important to the large group of processing taxpayers for other reasons. As stated above, refund claims under Title VII must be filed prior to July 1, 1937. If taxpayers file claims and institute proceedings under these provisions, they may be estopped to attack the constitutionality of such provisions. Cf. *Buck* v. *Kuykendall*, 267 U. S. 307, 316; *Hirsh* v. *Block*, 267 Fed. 614 (D. C. App.), reversed on other grounds, 256 U. S. 135.

Apart from estoppel, processing taxpayers who file petitions with the Board of Review under Title VII may find that the Board is unable to grant any relief if they suceed in establishing the unconstitutionality of Title VII. If the

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[6] Senate Rep. No. 2156, 74th Cong., 2nd Sess., p. 32; House Rep. No. 2818, 74th Cong., 2nd Sess., p. 2.

[7] 1 Federal Register 1934.

provisions of Section 906 creating a Board of Review and defining its jurisdiction and powers should be held to be inseparably connected with Section 902, as we think they are, and if the provisions of Section 902 are held unconstitutional as impairing vested rights, Section 906 would fall along with Section 902 and there would therefore be no statutory authority for the Board to enforce the constitutional rights of taxpayers in the Board proceedings.

A mere reading of the provisions of Title VII should make it clear that the procedural provisions of Sections 903, 904 and 906 were adopted solely upon the assumption that the substantive provisions of Section 902 were valid. The legislative history makes it absolutely clear that the Board of Review was created for the sole purpose of passing upon the "extremely complicated economic and accounting considerations" involved in the determination as to whether the processing tax burden had been shifted.[8] If Section 902 is unconstitutional, and if it is therefore unimportant whether the tax burden has been shifted in individual cases, then it is inconceivable that Congress would have intended that the novel procedural provisions of Title VII should remain operative.[9] The procedural provisions of Title VII are inseparably connected with the substantive provisions; and taxpayers who elect to invoke the procedure provided in Title VII are likely to gain a futile victory if they succeed in establishing the unconstitutionality of Section 902, only to find that the Board of Review itself has no legal existence and is therefore without power to grant them relief.

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[8] See Senate Rep. No. 2156, 74th Cong., 2nd Sess., p. 33; House Rep. No. 2818, 74th Cong., 2nd Sess., p. 2.

[9] See *Lynch* v. *United States*, 292 U. S. 571, 586; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241, 242; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, 305; *Dorchy* v. *Kansas*, 264 U. S. 286, 289, 290; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 361, 362; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312, 313.

Moreover, if this Court delays the decision of these constitutional questions, and Title VII is eventually held constitutional, the dockets of the Federal Courts will have been unnecessarily congested with thousands of cases of this type. Such actions must be brought within two years from notice of rejection of the refund claims.[10] The claims in thousands of such cases were rejected as far back as August 1935 (R. 5, 14). According to the Department of Justice, 250 cases like the present are already pending in the lower Federal courts. With the end of the limitation period approaching, thousands of new suits will probably be filed.

There is, therefore, an urgent need for an early decision of the questions here presented because of the public and private expense involved and because of the confusion and uncertainty that exist as to the constitutional rights of thousands of taxpayers.

Conclusion.

In view of the fact that the court below has decided vitally important and far reaching questions of constitutional law in a way clearly in conflict with decisions of this Court and contrary to the fundamental principles of our constitutional system, and in view of the great public importance of an early reversal of these holdings and an early settlement of the issues involved in these processing tax refund suits, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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[10] Rev. Stat. Sec. 3226, as amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

Title VII, Revenue Act of 1926—Refunds of Amounts Collected under the Agricultural Adjustment Act.

SEC. 901. *Repeals:*

Sections 21(d), 21(e), and 21(g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. *Conditions on Allowance of Refunds:*

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustments Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. *Filing of Claims:*

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. *Statute of Limitations:*

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, setoff, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this Title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. *Jurisdiction of Courts:*

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. *Procedure on Claims for Refunds of Processing Taxes:*

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employes of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum from the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division

thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury Department as may be necessary to perform its functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an officer or employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned

by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented by counsel, to have witnesses subpœnaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpœna, signed by any member of the Board, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, records, correspondence, memoranda, and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings and decision shall be reviewed by the Board. The findings and decision of a division shall

not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been

urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. *Evidence and Presumption:*

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of

such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such months shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such months, and the resulting figure shall be the margin for the month.

(2) *Period Before and After the Tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of Commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to

such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or

received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when mar-

gins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

* * * * * * *

SEC. 910. *Liability of Collectors:*

No collector of internal revenue or customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government.

• • • • • • •

SEC. 913. *Definitions:*

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(c) The term "commodity" means any commodity, prior to processing, of a type with respect to the processing of which a processing tax was imposed under the Agricultural Adjustment Act.

(d) The term "article" means the product which is obtained by processing a commodity, and includes the product obtained by further manufacture or by combination with other materials.

(e) The term "refund" includes any recovery, recoupment, set-off, credit, or counterclaim.

(f) The term "Agricultural Adjustment Act" means the Agricultural Adjustment Act as originally enacted and the amendments thereto adopted prior to January 6, 1936.

UNITED STATES REVISED STATUTES:

SEC. 3220. (As amended by Sec. 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Sec. 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791). Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section (U. S. C., Title 26, Sec. 1670).

SEC. 3226. (As amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169). No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from

the date of filing such claims unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates (U. S. C., Title 26, Secs. 1672-1673).

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 667.

ANNISTON MANUFACTURING COMPANY, *Petitioner*,

v.

HARWELL G. DAVIS, Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 667.

ANNISTON MANUFACTURING COMPANY, *Petitioner*,

v.

HARWELL G. DAVIS, Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Alabama in the present and similar cases is reported in 15 F. Supp. 257, under the name of *Lincoln Mills of Alabama* v. *Davis* (R. 38-39). The opinion of the Circuit Court of Appeals (R. 47-59) is not yet officially reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 8, 1937 (R. 60). The petition for a writ of

certiorari was filed January 21, 1937, and was granted February 15, 1937 (R. 61). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the provisions of Title VII of the Revenue Act of 1936 are constitutional and operative in so far as they attempt to restrict or defeat petitioner's vested right of action against a collector of internal revenue for the recovery of amounts illegally exacted from petitioner, by the collector, as taxes under the unconstitutional Agricultural Adjustment Act.

STATUTES INVOLVED.

The pertinent provisions of Title VII and Title III of the Revenue Act of 1936 (Act of June 22, 1936, c. 690, secs. 901 *et seq.* and sec. 501) are set forth in the Appendix, *infra*. There are also set forth in the Appendix the provisions of Sections 3220, 3224, 3226, and 3228 of the Revised Statutes as amended, the provisions of Section 424(a) of the Revenue Act of 1928, and the provisions of Section 21(d)(1) of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935. Other statutory provisions are quoted at pertinent places throughout the brief.

STATEMENT.

This action was brought by petitioner for the recovery of approximately $270,000.00, which respondent, a collector of internal revenue, had collected from petitioner as floor stock and processing taxes under the purported authority of the Agricultural Adjustment Act,[1] which was held unconstitutional in *United States* v. *Butler*, 297 U. S. 1. The

[1] Act of May 12, 1933, c. 25, Title I, 48 Stat. 31, 7 U. S. C. A. Secs. 601 *et seq.*

District Court sustained respondent's general demurrer and dismissed the amended complaint (R. 40), and this judgment was affirmed by the Circuit Court of Appeals (R. 60).

It is alleged in the amended complaint that all of the amounts in controversy were paid by petitioner to respondent under duress and that at the time of making all of said payments (except the first three, involving less than $8,000.00), petitioner protested to respondent that said taxes were illegal and unconstitutional (R. 19). The complaint also alleges that claims for refund had been filed with respondent on the ground that the Agricultural Adjustment Act was unconstitutional and said taxes were illegal by reason of several provisions of the Constitution, including the Tenth Amendment (R. 4-7, 11-14). It is alleged further that the claims were rejected by the Commissioner prior to suit (R. 4, 11).

It is undisputed that as the law stood at the time petitioner's claims were rejected, petitioner was entitled to recover upon the basis of the allegations in the complaint. However, after the cause of action arose, Congress added Section 21(d) to the Agricultural Adjustment Act by the amendatory act of August 24, 1935.[2] That Section denied to processors the right to recover refunds of taxes illegally collected under that Act, unless they could establish that they had not included the tax in the price charged for their products, that they had not passed on any part of the tax to others, and that they had not reduced the price which they paid for the raw commodity by any part of the tax.

Section 21(d) was repealed by the Revenue Act of 1936 and new provisions were enacted in Title VII of that Act, relating to "Refunds of Amounts Collected Under the Agricultural Adjustment Act".[3]

---

[2] Act of August 24, 1935, c. 641, sec. 30, 49 Stat. 771, 7 U. S. C. A. Sec. 623(d), Appendix, p. 99, *infra*.

[3] Act of June 22, 1936, c. 690, secs. 901 *et seq.*, 49 Stat. 1747, 7 U. S. C. A. secs. 644-659, Appendix, pp. 79-91, *infra*.

In his amended demurrer respondent relied for a defense upon the provisions of Title VII of the 1936 Revenue Act, which are summarized below.

Section 902 of that Act provides in general that no refund shall be allowed of any amount collected as tax under the Agricultural Adjustment Act unless the claimant establishes that he bore the burden of such amount and has not shifted such burden, directly or indirectly, through inclusion in the price of articles claimant sells, through reduction of the price paid for the unprocessed commodity, "or in any manner whatsoever".

Section 903 requires the filing of new claims for refund, after the passage of the 1936 Act. Section 904 provides that no suit shall be brought to recover amounts collected as floor stock or compensating taxes under the Agricultural Adjustment Act, before the expiration of 18 months after a claim is filed under Title VII. Section 906 prohibits the maintenance of suits or proceedings to recover amounts collected as processing taxes, except as provided in Section 906. That section goes on to create a Board of Review in the Treasury Department, before which claims for refund of processing taxes may be prosecuted. Provision is made for review of the Board's decisions in the Circuit Courts of Appeals and for review by this Court of the judgments of such courts on writs of certiorari. Section 907 establishes a statutory presumption for determining the extent of "shifting" by the processor, based solely upon a comparison of manufacturing margins during the tax period and during a specified comparative period.

Section 910 provides that no collector of internal revenue shall be in any way liable for any act done by him under the Agricultural Adjustment Act in the performance of his official duties under the provisions of such Act.

In sustaining respondent's general demurrer the District Court upheld the validity of Title VII upon the authority of *United States* v. *Jefferson Electric Mfg. Company*, 291 U. S. 386. The Circuit Court of Appeals affirmed the judg-

ment of the District Court on other grounds, and expressly stated that under its view it was unnecessary to consider the effect of the decision of this Court in the *Jefferson Electric Company* case. The Circuit Court of Appeals held that this action is a suit against the United States originally "consented to by it through the fiction of a suit against the Collector" (R. 54). It held further that Congress, in the exercise of sovereign immunity to suit, had withdrawn consent to suits of this kind, and that this withdrawal was effective to cut down vested rights of action based upon the collector's exaction of money under an unconstitutional statute, *even if no substitute remedy was provided* (R. 54, 59). The court below further held that, except by provision of statute, no right of action could have arisen against the collector for the wrongful exaction from petitioner of money under the unconstitutional Agricultural Adjustment Act for the reason that the unconstitutionality of the Act was "far from plain" and had not been searched out and declared at the time of the collections here in question (R. 56-59).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that Congress can, consistently with the due process clause of the Fifth Amendment, destroy a taxpayer's vested right of action to recover from a collector amounts collected as taxes under an unconstitutional statute without affording any other remedy.

2. In holding that this action was not against the collector, personally, but was in reality an action against the United States.

3. In holding that the District Court was without jurisdiction to entertain this action.

4. In failing to hold that the provisions of Title VII violate the due process clause of the Fifth Amendment in attempting to restrict and defeat petitioner's action against a collector for the recovery of amounts exacted as taxes under the unconstitutional Agricultural Adjustment Act.

5. In failing to hold that Section 902 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment as impairing petitioner's right to a refund.

6. In failing to hold that Section 902 is void under the constitutional doctrine of the separation of powers in that it is so vague, uncertain and ambiguous that an attempt by the courts to give it a definite construction would require the courts to legislate.

7. In failing to hold that the procedural provisions (Sections 903, 904 and 906) of Title VII are inseparably connected with Section 902 and therefore fall with that section.

8. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying any effective judicial remedy for the collection of an unconstitutional tax.

9. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying a fair and effective administrative remedy for the collection of an unconstitutional tax.

10. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT.

Respondent will not deny that each count of the complaint herein would set forth a cause of action for the recovery of the sums in question if it were not for Title VII of the Revenue Act of 1936, which was enacted seven months after suit was filed. The right of action which petitioner had to recover back such sums had vested prior to August 24, 1935, when Congress made the first attempt, by Section 21(d) of the AAA, to block recovery of amounts collected under the authority of the AAA.

It is established by decisions of this Court that such a right of action is property, subject to the protection and guarantees of the Fifth Amendment to the Constitution; and that such right cannot be destroyed, either directly or under the guise of a regulation of procedure.

It is also well established that the Collector of Internal

Revenue is personally liable for the wrongful collection of money under an unconstitutional statute, and that the collector's personal liability cannot be defeated by the sovereign's claim of immunity to suit.

The vested right of action which petitioner had against the collector personally could not be destroyed, without regard to whether any alternative remedy is provided against the United States.

But even on the theory that the right of action could be taken away if a fair and adequate remedy were set up in its place, it is clear that the so-called remedy which Title VII purports to afford is in reality no remedy at all. The effect of Title VII is to deny all remedy with reference to the illegal collection of sums under the AAA.

The terms used in Section 902 are so vague and uncertain that the purported remedy under Title VII cannot be compared with the remedy which it seeks to displace. Moreover, Section 902 is susceptible of many different constructions, one as plausible as the other. It would require legislation, and not merely construction, by the courts, to give the section a *definite and precise* meaning.

It may be assumed that the *general purpose* of Section 902 is to deny refunds to processors to the extent that the processors have been able to charge more in the sale of their goods, or to pay less in the purchase of raw commodities, than the prices which would have prevailed if the processing tax had not been imposed. The proof of these facts in the case of a cotton processor would involve a comparison of the actual prices paid for raw cotton, and actual prices received for manufactured cotton goods during the twenty months tax period, with the market prices which *would have* prevailed for raw cotton and the finished goods *if* the processing tax had not been imposed. The facts as to what prices would have prevailed under such imaginary conditions clearly are not susceptible of legal proof, and yet the processors are required to prove such facts in order to recover. Section 902 standing alone, therefore, affords no remedy.

The presumption created by Section 907 is so arbitrary and unreasonable as to make apparent, on a casual examination, what the whole history of the legislation confirms—that the purpose of Title VII was to bar recovery by processors in as many cases as could be brought within a statute which was thought to have even a semblance of constitutionality.

Even if it should be conceded that Title VII does not impose an absolutely impossible burden of proof, it must be conceded that the proof as to who bore the economic burden of the tax is, to say the least, highly difficult to produce, and highly uncertain and speculative in character; and the imposition retroactively of such a burden of proof upon the holder of a vested legal right of action clearly impairs that right in violation of the Fifth Amendment.

Aside from the impossibility or difficulty or proof, the shifting of the economic burden of the processing tax, even if any such shifting occurred, cannot be made a basis for denying recovery to the processor from whom such tax has been unconstitutionally exacted. Even if the processor has shifted the amount of the tax to others, he may have suffered damages largely in excess of the amount of the tax, by reason of a shift in consumption or decrease in market resulting from the imposition of the tax.

But even if a processor has shifted the amount of the tax, and has suffered no other damage from the imposition of the tax, he is not *unjustly* enriched by the recovery back of the taxes illegally exacted from him. A processing tax refund in such a case is no different from a refund of ad valorem taxes, rebates of freight over-charges, or any other decrease or allowance in items representing the seller's overhead and cost of production. Where the parties had agreed upon a definite flat price to be paid for specific goods, no principles of equity, justice or public policy would sanction upsetting the consummated transactions between the parties. The seller often profits, but he does not profit unjustly, where the trade generally has overestimated production costs; and he loses where the trade has underesti-

mated these costs. This is fundamental in our economic system. It would be shocking to suggest that Congress could by retroactive legislation alter the contract of the parties and require the seller to rebate a portion of the agreed price to the purchaser. If Congress is thus powerless to change the respective rights of buyer and seller, it certainly cannot destroy the processor's right against the collector on the ground that the processor would otherwise receive a refund to which his customers would be equitably entitled.

If a taxpayer sells goods at a stated price and undertakes to collect the tax as such from the purchasers, he may be legally or equitably bound to hold any refund for the purchasers' account. In such a case, Congress might protect the purchasers by a statute in the nature of a real party in interest statute, such as this Court considered to be involved in the case of *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386. However, as pointed out above, Title VII does not purport to restrict the taxpayer's right to refund on the basis of any such circumstance, and therefore cannot be justified as a real party in interest statute.

The administrative and procedural provisions of Title VII are inseparably connected with Section 902 and fall with that section.

The Court is presented here with a situation which has no parallel in the history of the United States. Large sums were exacted as taxes under an unconstitutional statute at a time when the taxpayer had a clear and adequate remedy for the recovery of the full amounts in a suit against the Collector, or in a suit against the United States, as he might choose. On account of the existence of these adequate legal remedies for recovery, he could not obtain an injunction. After the exactions were made, and the legal rights to recover had vested, Congress enacted a statute which requires as a condition precedent to recovery proof of facts which have no relation to the illegal exactions, and which are not susceptible of legal proof. In practical effect it has thus destroyed the rights. A deci-

sion of this Court upholding such legislation would constitute a precedent dangerous beyond measure, and would, if carried to its logical conclusion, mean the end of official responsibility—the fundamental principle on which constitutional government rests.

ARGUMENT.

I.

Petitioner Had a Vested Right of Action Against the Collector Which the Fifth Amendment Protects Against Impairment.

The sums here in controversy were collected by respondent under the purported authority of the AAA, which was held unconstitutional in the case of *United States* v. *Butler*, 297 U. S. 1. Apart from the provisions of Title VII of the Revenue Act of 1936, it would be indisputable that petitioner had a right of action for the recovery back of such sums. We shall show that this right of action had become vested and could not be destroyed without violating the Fifth Amendment. Respondent was personally liable for collecting such sums under an unconstitutional statute, and Section 910 of the 1936 Act is itself unconstitutional in attempting to destroy the personal liability of respondent. Although we will urge that Section 910 would be invalid on that account without regard to the question as to whether any alternative remedy is provided against the United States, it will be developed later [under propositions II(B) and (C)] that Title VII of the 1936 Act does not afford any fair substitute remedy against the United States. In other words, *Title VII attempts to deny all remedy for the wrongful collection of taxes under the unconstitutional AAA.*

A. Petitioner Had a Vested Right of Action to Recover Back the Full Amount of Processing Taxes Illegally Collected.

The Collector of Internal Revenue in this case was allowed to collect millions of dollars in floor stock and processing taxes under the Agricultural Adjustment Act. With the force of the Government and the power of distraint behind him, he collected from petitioner about $270,000.00 as such taxes (R. 2, 9). In making all except about $8,000.00 of such payments, petitioner protested to respondent that the taxes were illegal and unconstitutional (R. 19). Payment was made nevertheless because under our system of revenue laws the policy has long been established that the taxpayer cannot stay the hand of the collector because he considers any particular exaction illegal or unconstitutional.[4] But it is also well established that due process of law requires that *some* effective remedy be afforded with reference to the illegal collection of taxes. *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17. Where the remedy of injunction is denied, some effective *refund* remedy must be provided. In our system of revenue laws, a taxpayer must pay first and litigate afterwards. An effective refund remedy meets the requirement of due process.

It is beyond question that at the time respondent collected the sums here involved petitioner had a right to maintain an action for the recovery back of such sums on the ground that they were collected under an unconstitutional statute. It was recognized that such an action could be maintained

[4] Section 3224 of the Revised Statutes (26 U. S. C. A. Sec. 1543) provides: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." See also *Bailey* v. *George*, 259 U. S. 16.

either against the United States[5] or against the collector who wrongfully collected the tax.[6] Although the general provisions of law recognizing proceedings for the recovery back of internal revenue taxes illegally collected[7] were broad enough to cover the cases of taxes imposed under the AAA, Section 19(b) of the original AAA specifically made such provisions of general law applicable in the case of taxes imposed under that Act.

Relying upon this "system of corrective justice intended to be complete",[8] petitioner paid the amounts demanded and filed claims for refund, which were rejected by the Commissioner before suit was commenced (R. 4, 11). Thus all conditions precedent to suit, under the statutory provisions just mentioned, were complied with before Congress began to tamper with the well established remedy at law for the recovery back of such amounts.

It was perfectly clear under the general provisions of law in force at the time of the illegal collections that the taxpayer was entitled to recover the *full* amount collected in the event that it should be held that the collection was illegal. The amount of the illegal collection was the measure

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[5] *United States* v. *Emery, Bird, Thayer R. Co.*, 237 U. S. 28.

[6] A right to sue the collector personally where the tax was paid under protest was recognized at common law in the absence of any statutory provisions covering the refund of taxes illegally collected. *Elliott* v. *Swartwout*, 10 Pet. 137; *Erskine* v. *Van Arsdale*, 15 Wall. 75, 77; *DeLima* v. *Bidwell*, 182 U. S. 1, 177-180. The greater portion of the sums in controversy were paid under protest (R. 19), although protest has not been a necessary condition for the maintenance of an action against either the United States or the Collector, since the amendment of Section 3226 of the Revised Statutes, which was made by the Revenue Act of 1924. *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

[7] See U. S. Rev. Stat. Secs. 3220, 3226, 3228 (26 U. S. C. A. Secs. 1670, 1672-1673, 1433) Appendix, pp. 101-102, *infra*.

[8] *Graham* v. *DuPont*, 262 U. S. 234, 255.

of recovery,[9] undiminished on account of any shifting of the tax burden[10] in transactions with third parties.

B. A Vested Right of Action for the Recovery of Money Cannot Be Impaired Without Violating the Fifth Amendment.

It has always been recognized that the property of which persons cannot be deprived under the due process clauses of the Fifth and Fourteenth Amendments[11] is not solely tangible property. The constitutional protection extends to intangible property as well, and includes vested rights of action. This Court has held that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference". *Pritchard* v. *Norton*, 106 U. S. 124, 132. See also *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332; *Graham* v. *Goodcell*, 282 U. S. 409, 429; *Ettor* v. *Tacoma*, 228 U. S. 148, 156; *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 457, 458; *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338; *Coombes* v. *Getz*, 285 U. S. 434.

The principle that a vested right of action cannot be im-

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[9] R. S. Sec. 3220 authorizes the Commissioner "to remit, refund, and pay back *all taxes* erroneously or illegally assessed or collected." 26 U. S. C. A. Sec. 1670. Section 3226 recognizes a taxpayer's right to maintain a "suit • • • for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 26 U. S. C. A. Secs. 1672-1673. (Italics supplied.) See Appendix, pp. 101-102, *infra*.

[10] The subject of shifting tax burdens is more fully discussed, *infra*, under propositions II(B) and II(C).

The question of the ultimate damage resulting from an illegal tax is impossible to determine. But it has always been clear that a taxpayer from whom a tax has been illegally collected can recover back the amount of the illegal collection without regard to *ultimate damage*. Cf. *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (involving recovery of freight overcharges).

[11] "The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge* v. *Long*, 282 U. S. 582, 596." *Heiner* v. *Donnan*, 285 U. S. 312, 326.

paired by subsequent legislation was held to apply with respect to a cause of action in quasi-contract arising out of a statutory liability. *Steamship Co.* v. *Joliffe, supra.* It has also served to invalidate a statute aimed at the destruction of a right of action to recover money paid under duress. *Forbes Pioneer Boat Line* v. *Board of Comissioners, supra.* The principle has also been applied with respect to a cause of action given by statute against a city for consequential damages from street grading of a kind for which the city, as a state governmental agency, could not be held in the absence of statute. *Ettor* v. *Tacoma, supra.* In the case of *Graham* v. *Goodcell, supra,* which is more fully discussed later as an authority for the proposition that an action against a collector cannot be defeated by virtue of the sovereign immunity to suit, this Court also recognized the general rule that "it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed". 282 U. S. at 426.

The constitutional protection of vested rights extends to the measure of damages authorized by law at the time the cause of action arises. *Kay v. Penn. R. R.* Co., 65 Pa. 269; *Lewis* v. *Penn. R. R. Co.*, 220 Pa. 317; *Preveslin* v. *Derby & Ansonia Developing Co.*, 112 Conn. 129. Otherwise the due process clause would constitute only a partial protection.

The case of *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386, upon which respondent relies, is in no way inconsistent with the contentions which we are here making. That case is fully discussed under proposition II(D), p. 65, *infra.* It involves consideration of principles which are yet to be developed in this brief and it is believed that consideration of the case should properly be left until those principles have been discussed.

C. Congress Cannot Under the Guise of Regulating Matters of Procedure and Remedies Render a Vested Right of Action Unenforceable and Thus Destroy It.

Legislatures cannot circumvent the constitutional guarantee against the impairment of vested rights through the guise of regulating matters of procedure and remedies. We recognize, of course, that the States or the Federal Government can go far, consistently with due process of law, in changing court procedures and the remedies provided for the enforcement of vested rights. As this Court has said, a suitor "has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the *preservation of his substantial right to redress by some effective procedure*". *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332. (Italics supplied)

It is clear, also, that the legislature may impose certain conditions precedent to the maintenance of an action. In the case of *Jones* v. *Union Guano Company*, 264 U. S. 171, the court, in upholding the validity of the conditions there imposed, said (p. 181):

> "The 14th Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object."

But it is just as clear that due process of law requires that *some* effective remedy be afforded for the enforcement of vested rights of action, and that legislation which purports to affect a remedy alone must be held unconstitutional if its practical effect is to destroy or impair a vested right of action. *Ettor* v. *Tacoma*, 228 U. S. 148, 155; *Truax* v. *Corrigan*, 257 U. S. 312, 329, 339; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 679, 680.

The mere fact that the legislature, in seeking to destroy vested rights, employs the form of a statute affecting court

procedure or remedies, will not save from unconstitutionality a statute which in substance and effect does destroy or impair such rights. The relations between rights and remedies in this regard has been described by this Court as follows:

> "Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also *a statute, under the form of taking away or changing a particular remedy, may take away an existing property right*, or impair the obligation of a contract." *Ettor* v. *Tacoma*, 228 U. S. 148, 155. (Italics supplied.)

Thus, in another case where a Government had attempted to avoid its just obligations by one means after another, it finally resorted to the device of imposing a practically impossible burden of proof upon anyone who attempted to assert rights based upon such obligations. In *McGahey* v. *Virginia*, 135 U. S. 662, it appeared that certain bonds issued by the state provided that the coupons should be receivable at maturity in their face amount for taxes of all kinds. After several unsuccessful attempts (such as the attempt involved in the case of *Poindexter* v. *Greenhow*, *infra*) to defeat this obligation, legislation was adopted requiring the institution of suit to recover taxes in all cases where coupons from state bonds were tendered. The legislature further provided that in all such litigation, the burden should be on the taxpayer to produce the bonds from which the coupons were cut in order to establish the genuineness of the coupons. The statute also prohibited expert testimony to prove the genuineness of coupons which did not bear the personal signature of the proper officer. It had become customary to cut matured coupons from state bonds, and such detached coupons were traded in generally. None of the coupons from state bonds bore the personal signature of any state officer but bore engraved facsimiles. Under these circumstances it was practically impossible for any coupon holder to establish the genuineness of such

coupons and this Court, therefore, held these statutory provisions unconstitutional. In the opinion of the Court, written by Mr. Justice Bradley, it was said (p. 694):

> "We have no hesitation in saying that the duty imposed upon the taxpayer of producing the bonds from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, was an unreasonable condition, *in many cases impossible to be performed.* If enforced it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. • • • It would be so *onerous and impracticable* as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them. We think that the requirement was unconstitutional." (Italics supplied.)

A somewhat similar situation was presented in the case of *Marsh* v. *Burroughs*, 1 Woods 463, 16 Fed. Cas. No. 9112 (C. C. S. D. Ga.). That case involved a provision of the Georgia (Carpetbag) Constitution of 1868 to the effect that in suits on notes, bills, etc., if the defendant swears he has reason to believe that the instrument was given or used in furtherance of "the rebellion", the plaintiff will have the burden of proving the contrary. In holding this provision repugnant to the United States Constitution, Circuit Judge Bradley said:

> "But the final portion, which throws the burden of proof on the plaintiff to show that the bills have never been used in aid of the Rebellion • • • imposes upon plaintiff an impossibility, and is tantamount to destroying the contract." (16 Fed. Cas. at 804)

This Court has also held unconstitutional certain statutes which undertook to create unreasonable presumptions or to provide for an arbitrary shifting of the burden of proof, although the statutes did not necessarily impose *impossible* conditions upon the enforcement of vested rights. See, for

example, *Bailey* v. *Alabama*, 219 U. S. 219, 239; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 86; *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 642; *Manley* v. *Georgia*, 279 U. S. 1, 6. These cases will be discussed more fully later on.[12]

D. The Collector is Personally Liable and Cannot Hide Behind the Sovereign Immunity to Suit.

The present action is against the Collector personally and not against the United States.[13] The personal nature of the action has been repeatedly recognized by this Court. *Sage* v. *United States*, 250 U. S. 33; *Bankers' Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Union Trust Co.* v. *Wardell*, 258 U. S. 537; *Levy* v *Wardell*, 258 U. S. 542; *Patton* v. *Brady*, 184 U. S. 608; *Graham* v. *Goodcell*, 282 U. S. 409. See also *White* v. *Hopkins*, 51 F. (2d) 159, 161, 162 (C. C. A. 5th).

In the case of *Graham* v. *Goodcell*, *supra*, this Court relied upon the nature of the action against the Collector as one against him personally in repudiating the suggestion that Congress could, in the exercise of the sovereign immunity from suit, withdraw the taxpayer's right to sue the Collector on an existing cause of action. In that case the Court had for consideration the constitutionality of Section 611 of the Revenue Act of 1928, a curative statute whereby Congress undertook to ratify certain unauthorized and illegal collections of internal revenue taxes. The Court

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[12] Proposition II(B)(3)(a), pp. 40-42, *infra*.

[13] Even if this action were against the United States, it could be urged that Title VII should be construed as an attempt to impair the *right* itself, as distinguished from the *remedy*, and that it is not to be construed as an attempt to assert sovereign immunity. Cf. *Lynch* v. *United States*, 292 U. S. 571. It could be urged that Congress would not have intentionally denied the right to sue had it realized that the Government's obligation remained. Cf. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, 80; *United States* v. *Klein*, 13 Wall. 128; *Duke Power Co.* v. *South Carolina Tax Commission*, 81 F. (2d) 513.

held that the particular statute involved in *Graham* v. *Goodcell* was valid as a curative statute.[14] However, the Government had made the argument that Section 611 could be upheld as a withdrawal by Congress of the consent of the United States to be sued. This contention of the Government was repudiated by the Court in the following language (p. 430):

> "The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the *collector individually* and were based upon the *right to recover as against him by reason of his illegal acts.* Such an action is personal, and not against the United States. • • • If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 679, 680." (Italics supplied.)

In a case like the present where an officer takes property under an unconstitutional statute, it is especially clear that he is personally liable. Since Congress had no power to impose the exaction, it could not authorize respondent to col-

[14] The particular statute involved in *Graham* v. *Goodcell* was held valid as a curative statute, upon principles of legislative ratification. Section 21(b) of the AAA, which was added by the amendatory act of August 24, 1935, undertook to legalize and ratify collection of the processing taxes, upon principles similar to those applied in *Graham* v. *Goodcell, supra.* This Court has held that this attempt to legalize processing taxes could have no effect, in view of the lack of congressional power to impose the taxes in the first instance. *United States* v. *Butler,* 297 U. S. 1, 78; *Rickert Rice Mills, Inc.* v. *Fontenot,* 297 U. S. 110, 113. This Court recognized in *Graham* v. *Goodcell* that, unless the statute there involved was effective to legalize the collection, it would be unconstitutional as destroying the taxpayer's vested right of action against the collector for the recovery back of illegally collected taxes.

lect it and the unconstitutional statute can give respondent no protection. It has always been a fundamental principle of our constitutional system that the sovereign immunity to suit cannot shield a government officer from personal liability for damage done under an unconstitutional statute. *Poindexter* v. *Greenhow*, 114 U. S. 270; *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642, 643; *Scott* v. *Donald*, 165 U. S. 58; *Cruickshank* v. *Bidwell*, 176 U. S. 73; 81; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 842-843, 853-854; *Dennison Manufacturing Co.* v. *Wright*, 156 Ga. 789.

In the case of *Poindexter* v. *Greenhow*, 114 U. S. 270, it was held that an action of detinue would lie against a tax collector, who, acting under the mandatory provisions of a state statute, had refused to accept coupons from state bonds in payment of taxes and had proceeded to seize the taxpayer's property. This Court held that the state statute purporting to take away from the coupons the quality of receivability for taxes was unconstitutional. The Court repudiated the suggestion that the suit was "substantially an action against the state", and pointed out the fundamental distinction between suits against the state and suits against state officers acting under an unconstitutional statute. With reference to this point, the Court said (p. 291):

> "This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say 'L'Etat c'est moi.' Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend

> and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. • • •."

Scott v. *Donald*, 165 U. S. 58, was an action against South Carolina constables for seizing several packages of whiskey belonging to the plaintiff. The defense was that the whiskey had been imported from other states contrary to the South Carolina Dispensary Act, which recognized as legitimate the manufacture and sale of domestic liquors, but prohibited the importation of liquor from other states. This Court held the Dispensary Act unconstitutional, and further held that the South Carolina officers were personally liable, saying (p. 67):

> "A preliminary question is raised by the proposition that these are in fact suits against the State of South Carolina, and forbidden by the 11th Amendment. This question is sufficiently disposed of by referring to the late case of In re Tyler, 149 U. S. 164, where the conclusion of numerous previous cases was stated to be that where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the State."

Cruickshank v. *Bidwell*, 176 U. S. 73, was a suit to enjoin the enforcement by a collector of customs of a statute providing for the seizure of impure and unwholesome tea. The bill alleged that the act was unconstitutional as delegating

legislative power to the Secretary of the Treasury. It was held that an injunction would not lie since there was an adequate remedy at law, the Court saying (p. 81):

> "The official character of the collector, the provisions of the act, and the regulations of the Secretary of the Treasury in execution thereof would not constitute a defense, if the act were unconstitutional."

The good faith of the officer in such a case is no defense. Even if he honestly believes that the statute under which he acts is valid, the unconstitutional statute "confers no authority" and "affords no protection".[15]

These principles are "essential to the idea of constitutional government". The citizen cannot be left at the mercy of administrative or executive officers acting under unconstitutional statutes. Where the sovereign is immune to suit, the citizen must necessarily rely upon the personal liability of the governmental officers or agents.[16]

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[15] "But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit." *Hopkins* v. *Clemson College*, 221 U. S. 636, 644. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U. S. 425, 442.

[16] In England also it is recognized that the sovereign immunity does not extend to public officers. See Dicey, "*Law of the Constitution*" (8th Ed.) p. 189, where it is said: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person."

The risk which these principles impose upon public officers is trivial compared with the danger to constitutional government which would result from the denial of such principles. As a matter of fact, the Collector should not run any great risk of hardship in the present case, since the Government has a moral obligation to reimburse its officers for damages which they may suffer by reason of any action taken in good faith under an unconstitutional statute. No honest government will fail to fulfill this obligation. In any event, since the officer has committed the wrong, it is he and not the injured person who must run the risk.

E. Respondent's Authorities on the Nature of the Action Against the Collector Are Distinguishable.

Respondent has relied upon the decision of this Court in *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373,[17] as indicating that the action against a collector of internal revenue is not a personal action. In that case the Court held that the collector's liability for an illegal collection could be enlarged under circumstances where it was apparent that the collector would be indemnified by the Government. Nowhere in the opinion of the Court does Mr. Justice Cardozo question the soundness of the long line of decisions of this Court holding that taxpayers can maintain actions against collectors personally to recover taxes illegally collected. As a matter of fact, the latter principle was reaffirmed by a unanimous court in *Tait* v. *Western Maryland Ry.*, 289

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[17] That was an action against a collector to recover an overpayment of income taxes. The defense was that payment was not made under protest. The Revenue Act of 1924, which was enacted after the payment in question, authorized refunds of internal revenue taxes illegally collected even though payment had *not* been made under protest. The court held, against the contention of the collector, that the 1924 Act should be applied retroactively in suits both against collectors and against the United States, so as to cover payments made prior to its passage, and that the Act as thus construed was constitutional.

U. S. 620, 627, decided *three weeks after* the decision in the *George Moore Ice Cream Co.* case.[18]

It is true that in the opinion of the court in the *George Moore Ice Cream Co.* case Mr. Justice Cardozo said (p. 382):

> "A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought."

However, in making that statement Mr. Justice Cardozo referred to the development of statutory remedies against the Government. In describing a suit against a collector as a "relic of bygone modes of thought", the learned Justice was obviously referring to the fact that for many years the Government had waived its sovereign immunity, thereby rendering it unnecessary during those years to sue the collector. Thus he said (p. 382):

> "There may have been utility in such procedural devices (as suits against collectors) in days when the Government was not suable as freely as now."

Mr. Justice Cardozo did not consider the possibility that in our day our Government would attempt to hide behind sovereign immunity to suit in order to avoid the refund of taxes illegally collected. He was dealing with a case where "A high-minded Government renounced an advantage that was felt to be ignoble". He had just referred to the "fine sense of honor" which had prompted the enactment of the statute making protest an unnecessary condition.

We are now confronted with a totally different situation. The respondent seeks to justify, on the theory of sovereign immunity to suit, an impairment of the remedy, not only against the United States but also against the col-

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[18] In the *Tait* case this Court said: "In a suit for unlawful exaction the liability of a collector is not official but personal. Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham v. Goodcell, 282 U. S. 409, 430."

lector, for the recovery of taxes exacted under an unconstitutional statute. We think it clear that Title VII is properly to be construed as an attempt to impair the *right* itself, as distinguished from the *remedy*, and that it is not to be construed as an attempt to assert sovereign immunity even in suits against the United States.[19] If, however, the respondent is correct in his interpretation of the statute and if the Government is falling back again upon outmoded principles of sovereign immunity, it again becomes necessary for taxpayers to resort to the fundamental principle that a government officer is personally liable for his action under an unconstitutional statute, and must answer in damages to injured parties where the government fails to provide a complete remedy against itself.

There is certainly nothing in the *George Moore Ice Cream Co.* case to indicate that the action against the collector is not a personal action, even though it was considered an *unnecessary* form of proceeding under the state of the law *at that time.*

In the court below respondent urged that this case could be decided in his favor "on the authority alone of *Cary* v. *Curtis*", 3 How. 236.[20] That case is clearly distinguishable from the present case. The statute which the court there

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[19] See footnote 13, p. 18, *supra.*

[20] Although it is clearly distinguishable from the present case, *Cary* v. *Curtis* is of questionable authority. Mr. Justice Holmes, writing the opinion of the court in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4, said: "As the law stood before later statutes a collector was liable personally for duties mistakenly collected, • • • But, after an Act of Congress had required collectors to pay over such monies, it was held, *against the dissent of Mr. Justice Story*, that the personal liability was gone. Cary v. Curtis, 3 How. 236. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors, • • •. This however is not the language of the statutes and *hardly can be reconciled with the decision of this Court* in Sage v. United States, 250 U. S. 33, and other cases to which we shall refer." (Italics supplied.)

construed as precluding the form of action for money had and received against a collector of customs for excessive duties, was not applied retroactively so as to affect any vested right of action against a collector. The court relied upon the fact that the statute was prospective in operation, and that the terms of the statute "operated as notice to everyone". 3 How. at 242. The Court in *Cary* v. *Curtis*, also pointed out that the effect of the statute there involved was simply to make the particular form of action for money had and received inapplicable in such cases and to leave open to importers all other judicial remedies. 3 How. at 250.[21]

Respondent has also relied upon certain provisions of the customs and tariff acts as authority for upholding the validity of Section 910.[22] It is true that collectors of customs are given a statutory immunity with respect to erroneous rulings or decisions as to the appraisement or the classification of imported merchandise. Cf. 19 U. S. C. A. Sec. 1513. However, no attempt has ever been made to apply such provisions retroactively so as to strike down a vested right of

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[21] In *Cary* v. *Curtis* the court expressly pointed out that the remedies of replevin, detinue and trover were still available to importers with respect to the illegal demands of collectors. 3 How. at 250. In *Tracy* v. *Swartwout*, 10 Pet. 80, it had been definitely held that a collector of customs was liable in trover for retaining possession of goods for excessive duties. See also, *The Conquerer*, 166 U. S. 110, 124, 125.

[22] Cases involving procedures under the Customs Laws are governed by constitutional principles that are inapplicable in internal revenue cases. Customs duties are collected under the congressional power to regulate foreign commerce. *University of Illinois* v. *United States*, 289 U. S. 48. Cf. *Lloyd Sabaudo etc.* v. *Elting*, 287 U. S. 329; *Buttfield* v. *Stranahan*, 192 U. S. 470, 493, 497. In *Origet* v. *Hedden*, 155 U. S. 228, 238, the court said: "Duties imposed under tariff laws are paid in order that goods may be brought into the country, and provisions in respect of their levy and collection are framed in view of the character of the transaction. The finality of the appraisal is a condition attending the importation prescribed by the government as essential to the operation of the system."

action against a collector.[23] Moreover, such provisions in the customs and tariff acts have always been accompanied by other provisions which afforded to importers a substantial remedy with respect to the matters as to which the collector was relieved from liability. Cf. 19 U. S. C. A. Secs. 1514, 1515.[24] There is nothing in the statutory provisions conferring immunity on customs collectors, or any of the decisions thereunder, to indicate that such immunity can be conferred in any case where the collector acts beyond his jurisdiction or under the purported authority of an unconstitutional statute. See *DeLima* v. *Bidwell*, 182 U. S. 1, 177. It is perfectly clear from the authorities discussed above [under proposition I(D)] that an officer cannot be given immunity with respect to exactions made under an unconstitutional act, and there is nothing in any of the cases relied upon by respondent below which even suggests the contrary.

Respondent has also relied on certain authorities as supporting the contention that the action against an internal revenue collector is statutory. Even if the right of action against the collector were statutory, it could not be destroyed once it had vested. See the discussion of the cases of *Ettor* v. *Tacoma*, and *Steamship Company* v. *Joliffe*, *supra*, pp. 13-14, where rights of action were held indestructible, although they depended necessarily upon statutes and would not have arisen at common law. However, "The right to sue the Collector for an unjustified collection was given by the common law",[25] and is still spoken of as a

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[23] Immunity was first conferred upon customs collectors in such cases by Section 25 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131. Express provision was made in Section 29 of the Act against the impairment of existing causes and rights that accrued under prior laws.

[24] It will be shown later under propositions II(B) and II(C), *infra*, pp. 29 and 51, that Title VII of the 1936 Revenue Act does not afford any real remedy, judicial or administrative.

[25] *United States* v. *Emery, Bird, Thayer R. Co.*, 237 U. S. 28, 31.

common law right modified by statute, and not as a statutory right.[26]

II.

Title VII of the Revenue Act of 1936 Unconstitutionally Impairs Petitioner's Vested Right Against the Collector.

A. Section 910 is Void as Destroying the Collector's Personal Liability, Regardless of Whether any Alternative Remedy Against the United States is Provided.

We have shown under our first main proposition (I) that petitioner had a vested right of action against the collector personally, which could not be impaired under the Fifth Amendment. Section 910 of the Revenue Act of 1936 directly and unequivocally attempts to destroy the collector's personal liability. It would seem clear that Section 910 would thus be void under the Fifth Amendment, regardless of whether any alternative remedy is provided against the United States. It is true that Title VII purports to afford a special statutory remedy against the United States with respect to taxes collected under the unconstitutional AAA. However, since the right of action against the collector personally had already become vested, that right cannot be destroyed by providing an alternative remedy against the United States. A vested right of action against one individual cannot be destroyed by substituting a right of action against another individual.[27] It would seem even clearer that a vested right of action against an individual cannot be destroyed by substituting a right of action against the Government, which may be cut short at any time by the Government's withdrawal of consent to suit. A remedy

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[26] *Sage* v. *United States*, 250 U. S. 33, 37. Cf. *DeLima* v. *Bidwell*, 182 U. S. 1, 177 *et seq.*

[27] Cf. *International Steel & I. Co.* v. *National Surety Co.*, 297 U. S. 657.

against the Government is always speculative and uncertain, and often illusory.

We submit therefore that Section 910 is invalid even though a remedy, no matter how adequate, is provided against the United States. We do not rest our case here, however. We undertake to show, in the argument which follows in propositions II(B) and II(C), that Title VII does not provide any real remedy whatsoever, either against the United States or against the Collector.

B. The Remedy Provided by Title VII is Grossly Inadequate and Illusory Because of the Uncertainty of Terms and Impossibility of Proof.

It has been shown above that Congress cannot destroy the vested right which petitioner had to recover amounts unconstitutionally exacted from it, certainly unless some fairly equivalent right is set up in its place.[28]

We demonstrate under this proposition, II(B), that the conditions upon recovery imposed by Section 902, even if otherwise constitutional, are so vague and uncertain as to be meaningless, and that any court, in order to give them meaning, must exercise a legislative and not a judicial function; that any meaning which the respondent will suggest involves an inherent impossibility of proof; that the arbitrary presumption established by Section 907 does not remove such impossibility, but on the contrary tends, as it was doubtless intended to do, to establish by presumption a conclusion not in accord with the actual facts; that therefore the ostensible right of recovery given by the act is only an illusion, and the taxpayer is actually left without any remedy or redress whatsoever for the wrong which has been done by the collection of these illegal taxes.

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[28] Petitioner has contended above that the right against the Collector cannot be destroyed even if a substitute fairly equivalent is set up in its place.

1. *Section 902 is so Vague and Uncertain that it is Meaningless, and Therefore Affords No Remedy.*

The point we make under this subheading is that Section 902 is so unintelligible that it affords no remedy, because it is impossible to know what the remedy embraces, and a court, in order to give the section any definite meaning, would be required to legislate.

Section 902 purports to make the right of processors to recover any amount of processing taxes illegally collected depend upon proof by the processor—

> "That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, • • • • in the price of any article with respect to which a tax was imposed under the provisions of such Act (i. e., AAA), • • • (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever • • •."

The Government has not yet attempted to give any precise definition to the terms of Section 902.[29] It will probably be urged that the *general purpose* of the Section is to deny recovery where processors have shifted the economic

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[29] No attempt was made to give any official interpretation to Section 21(d)(1) of the AAA as amended, quoted in the Appendix, *infra*, p. 99. Even in the respondent's brief in this Court in *Rickert Rice Mills, Inc.* v. *Fontenot*, the Government suggested with equal seriousness various interpretations of the language of Section 21(d)(1), which are as wide apart as the poles. The Government stated: "It may be that the courts will hold that the tax is passed on when the selling price of the product equals its cost, plus the tax. Or the theory may be adopted that an absence of an increase in selling price of the product and an absence of a decrease in purchase price of the rough rice after the Act took effect, other costs being constant, is persuasive proof that the tax was not shifted. Or a comparison with a fair profit of pre-tax periods may possibly furnish the test." (Br. p. 48.)

burden of the tax,[30] in the sense in which those terms are used by economists. Even if Section 902 should be construed as expressing this general purpose, it does not set forth a sufficiently precise and definite legislative standard for the determination of the processor's right to a refund.

Economists would say *generally* that a processor has shifted the tax burden where he was able to charge more for his finished products or to pay less for his raw commodities than the prices that would have prevailed for such products and commodities if no processing tax had been imposed. See the introduction to Seligman, *"The Shifting and Incidence of Taxation"* (5th ed. 1926). See also Hunter, *"Outlines of Public Finance"* (1926), pp. 154 et seq.; Brown, *"The Economics of Taxation"* (1924), pp. 9-13, 56 et seq.; Lutz, *"Public Finance"* (2d ed. 1929), pp. 317 et seq. If the terms have this general meaning, the answer to the question as to whether a taxpayer has shifted the tax burden will depend upon a comparison between actualities or realities on the one hand, and imaginary or ideal conditions on the other. *Actual prices* must be compared with the *"prices that would have prevailed"* under other circumstances. As most economists would define the shifting of tax burdens, actual circumstances are to be altered so as to suppose that the tax had never been imposed, in order to furnish a comparative basis for determining the extent of the shifting of any tax burden.

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[30] Section 902 refers not only to *shifting*, but to the processor being *"relieved"* from the amount of the tax *reimbursed* for the amount of the tax. We do not even consider the great complications which these other phrases add, but discuss the Section as though it used only the term *shifted the burden of the tax*.

No one has suggested that the restrictions of Section 902 are confined to cases where the tax has been dealt with as a separate item in dealings between the processor and those with whom he deals, as was the case with Section 424 of the Revenue Act of 1928, upheld in *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, discussed under proposition II(D), *infra*.

However, it would be necessary to have a more precise definition if it is to be possible for processors to know the real meaning of the proposition which they are required to prove in order to qualify for a refund. Does the expression "shifting the tax burden" signify that a comparison is to be made between actual prices and the imaginary prices that would have prevailed if the tax had not been imposed and if *all other circumstances* are supposed to have happened as they actually did happen? If we are to suppose other circumstances to be altered in the imaginary state, what other circumstances are to be considered? Are we to imagine that the processing tax was never imposed, and *also* that benefit payments were not made to farmers under the AAA? Are we to imagine also that the production control program of the AAA was never put into effect? Or are we to imagine that it was put into effect by payments from some other source or by some other device?[31] All such circumstances affected the processors' prices. If the meaning of the term "shifting the tax burden" is to depend upon a comparison of actual and imaginary prices, we must know what are the particular circumstances to be considered in setting up the imaginary state of facts which is to furnish the standard.

Section 902 does not give any definition of the term "shifting the tax burden", and the term, even as used by economists, is so vague, uncertain and indefinite that it is impossible to know what the section provides. Section 902 cannot be held to afford any remedy, because processors cannot know *what is the proposition to be proved*, without regard to the possibility or impossibility of proof of any particular proposition. The presumption created by Section 907 of Title VII does not cure the uncertainty of Section 902; it does not purport to serve as a definition of the terms used in Section 902, but only to supply by arbitrary con-

[31] Cf. Bankhead Cotton Control Act (Act of April 21, 1934, c. 157, 48 Stat. 598, 7 U. S. C. A. Secs. 701 *et seq.*); Amendment to Soil Conservation Act (Act of Feb. 29, 1936, c. 104, 49 Stat. 1148).

clusion the unavailable and non-existing proof required by section 902.

If this Court should now be inclined to remedy the uncertainty by giving a definite and precise meaning to the terms used in Section 902, it could not do so without legislating. Since the section is open to at least four or five or more possible meanings, any one of which is as good as the other, this Court clearly cannot by *construction* give it only one meaning to the exclusion of the others. Such a process is a process of legislation and not of construction and is forbidden to the courts under our system of separation of powers. Cf. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500. It is just as though Congress had declared in general terms that in its opinion some unfairness might be involved in refunds to processors by reason of dealings between processors and their customers, and had provided that the court should determine what in its opinion should fairly be done to remedy the situation, and that when the court made the determination, such determination would have the effect of law, and refunds of unconstitutional exactions could be had only by complying with the court's pronouncement.

Compare the cases wherein this Court has held that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U. S. 385, 389. See also *Smith* v. *Cahoon*, 283 U. S. 553, 564; *Champlin Refining Co.* v. *Corporation Com.*, 286 U. S. 210, 243; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89, 90. These fundamental principles apply with respect to purely civil as well as criminal statutes. *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463.

2. *Section 902 Imposes an Impossible Burden of Proof.*

We have indicated at page 31 above what economists mean *generally* by the term "shifting the burden of the tax" and we have pointed out that there is no agreement as to any *precise* definition of terms. Without even attempting any precise definition, the purposes of the present argument will be fully served if we regard the term "shifting" in the *general* sense used by economists. As thus used,

> A processor would be said to have *shifted* the processing tax *forward* if he had been able to charge more for his finished product because of the tax than he would have been able to charge if the tax had never been imposed.
>
> A processor would be considered as having *shifted* the tax *back* if he had been able to pay less for the raw commodity because of the tax than he would have had to pay if the tax had never been imposed.

Any such proposition necessarily involves an inherent impossibility of proof.[32] The question as to how much a cotton mill *would have paid* for the raw cotton, and how much it *would have received* for its finished goods, in the absence of

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[32] In the discussion of impossibility of proof petitioner has assumed that it is possible to determine the amount of processing tax actually paid on each article of goods sold just as if the processing tax had been a sales tax based on the sales price of the goods. However, this assumption is contrary to fact. *It is clearly impossible to determine how much tax is paid on each article of goods processed from a particular bale of cotton.* The contents of a bale of cotton are not uniform. Cotton of varying types and grades, including marketable and unmarketable waste, comes from a single bale of cotton. The different products which the single bale of cotton produces are of widely different values. The law does not prescribe how the tax of 4.2¢ per pound on the bale is to be allocated between the different products, whether on the basis of weight, value, or a combination of both, or upon some other basis. It seems unnecessary to develop this argument of impossibility, because it is so clearly impossible to determine whether the burden of tax with respect to any article has been shifted, even if it can be known how much tax was actually paid on the article.

the processing tax, "is a problem that no human ingenuity could solve", to use the language of this Court in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 223. In that case this Court had under consideration a Kentucky statute which made illegal all agreements for the purpose of controlling the price of harvesters, etc., and of enhancing it above the "real value". The Kentucky cases had declared the "real value" to be "market value under fair competition, and under normal market conditions." In holding that it was impossible to ascertain what the market value would have been under fair competition and normal market conditions in a case where it was assumed that such competition and conditions did not exist, the Supreme Court, through Mr. Justice Holmes, said (pp. 223, 224):

> "The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts * * *."
>
> "* * * To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

The case of *Collins* v. *Kentucky*, 234 U. S. 634, which also arose under a Kentucky Anti-Trust statute, involved a question as to the legality of a combination of tobacco growers. Under the statute the legality of the combination depended upon the test as to whether it raised prices above the "real value". In pointing out the impossibility of as-

certaining what was the "real value", Mr. Justice Hughes, writing the opinion of the court, said (p. 638):

> "He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these were organized to oppose. The objection that the statute, by reason of its uncertainty, was fundamentally defective, was as available to Collins as it was to the Harvester Company."

In a similar situation, where shippers seek to recover excessive freight charges which they have been required to pay, the courts have held that the carriers cannot defend on the ground that the burden of freight rates has been shifted to consignees by reason of increased prices charged by the shippers. In reaching this result, the courts have recognized the inherent impossibility of determining whether, and to what extent, the freight burden has been shifted. In the case of *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, which involved this situation, Mr. Justice Holmes, writing the opinion of the Court, said (p. 534);

> "Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. R. 680."[11]

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[11] In *Burgess* v. *Transcontinental Freight Bureau*, 13 I. C. C. 668, 680, the Commission said: "If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them." In *Kindelon* v. *Southern P. Co.*, 17 I. C. C. 251, 255, the

The Congressional Committees reporting Section 902 recognized that it was no easy task to determine whether processing taxes had been passed on. The Committees said:

> "The question as to whether processing taxes were passed on, however, involves *extremely complicated* economic and accounting considerations." *Senate Rep. No. 2156*, 74th Cong. 2nd Sess., p. 33; *House Rep. No. 2818*, 74th Cong. 2nd Sess., p. 2. (Italics supplied).

However, the Committees do not give any explanation, simple or complicated, as to how a determination can be made of the extent to which the processing tax burden has been shifted.[34]

The insuperable problem of determining whether the economic burden of this tax has been shifted to purchasers was recognized in the *Report of the President's Cabinet Committee on the Cotton Textile Industry* (1935), where it was said:

> "It is impossible to disentangle the effect of any individual element of cost upon selling price." *Senate Doc., No. 126*, 74th Cong. 1st Sess., p. 142.

The same insuperable difficulty of proof is involved in seeking to determine whether the tax burden has been shifted back to the producer.

Both in his purchases and his sales, a cotton processor is dealing in a highly competitive market. He pays substan-

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Commission said: "The shipper who has been charged an unlawful rate, • • • is entitled to repayment without the imposition of the *impossible task* upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper." (Italics supplied.) Cf. *New York, New Haven & H. R. Co.* v. *Ballou & Wright*, 242 Fed. 862.

[34] It is true that a statutory presumption for solving the question is set up in Section 907 of the Act, but it will be shown later that such presumption is arbitrary and unreasonable and does not furnish a fair test for even approximating the extent to which the tax burden has been shifted in any case. See proposition II(B)(3)(a), *infra*, p. 40.

tially the market price for cotton and sells his finished goods at substantially the market price. It is obvious that a cotton processor cannot deduct any amount from the market price of cotton if he wishes to buy, nor can he add anything to the market price of finished goods if he wishes to sell. As was stated by the United States Tariff Commission in its *Report to the President on Cotton Cloth* (Government Printing Office, 1936):

> "The average cotton manufacturer has little more control over his marketing organization than has the individual cotton farmer. The price is fixed in both cases by a marketing mechanism operating quite independently of the individual producers, and they must take or leave price quotations at a particular time regardless of their cost of production." *Report No. 112*, 2nd Series, p. 92.

A processor can show what these prices were at any time before and at any time during the processing tax period, but he cannot show whether any difference in price during the processing tax period, as compared with the prices obtaining before the tax was imposed and after the tax was eliminated, is due to the tax.

The prices of raw materials and the prices of finished products are determined by so many complicated factors and the effect of each of these factors varies so much from time to time, that it is impossible even to attempt a quantitative measurement of the effect of any factor upon price at any particular time, or to know what the price would have been if that factor had been eliminated. Economists do not undertake to explain more than "what will happen in the long run". Bastable, "*Public Finance*," p. 367.

Demand may be very stable or it may be highly elastic. A small change in price may effect a great increase or decrease in demand or a shift to or from competitive products, as from cotton to jute or rayon, and this may vary greatly from time to time depending upon the whims of public taste. Prices are greatly affected by the money market and

credit conditions; by the optimism or pessimism of the public, whether or not based upon sound reason; by improvements in quality or in production methods of cotton goods and competitive products; by the general market and markets in related industries; by wages and conditions of employment; by Government spending; by unemployment and old age relief; and by countless hundreds of other factors upon which no numerical value can be placed. All of these make it impossible to make even an approximate guess as to the effect on prices of any single factor such as NRA wages and hours, soldiers' bonus, or the imposition or ending of the processing tax.

The Department of Agriculture recognized the complexity of the question involved and admitted that price comparisons do not afford the answer. In the *Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934*, the Department of Agriculture said (p. 220):

> "The question 'who pays the processing tax' cannot be answered by a mere examination of the change in producer, wholesale and retail prices and in the final spread between them. It is true that commonly this question is answered in this partial way without taking into account such facts as the volume of supplies, the rate of consumption, the amounts paid by consumers, the total returns to producers, the benefit payments made to producers from the proceeds of the processing tax, the stimulus to general business activity through increased farm purchasing power, and the improvement in the credit structure of the country through the enhancement of agricultural values."

And yet in order to recover under Title VII, a processor apparently would have to show what price he would have paid for cotton in the open market if the processing tax had not been imposed and must also show at what price he would have sold his goods if the processing tax had not been imposed. The most able economists with the help of all the

experts which the Government could furnish could do no more than *conjecture* as to what the market price of cotton or cotton goods would have been upon such a non-existent state of facts.[35]

3. Title VII is Unconstitutional in Arbitrarily Shifting the Burden of Proof and Creating an Unreasonable Presumption.

Congress, recognizing the impossibility of proof as to the shifting of the tax burden inherent in Section 902, sought to remedy that objection by creating in Section 907 a presumption for determining the extent to which the burden of the processing tax has been borne by the processor. We shall undertake to show below under (a) that this statutory presumption is arbitrary and unreasonable and therefore invalid; and under (b) that, apart from the statutory presumption, Title VII is arbitrary and unreasonable in shifting to the processor the burden of negativing the existence of all facts upon which the so-called defense of unjust enrichment might be based.

(a) *The presumption created by section 907 is arbitrary and unreasonable.*

The presumption created by Section 907 is based upon a comparison between the manufacturing margin (that is, the difference between the cost of the raw commodity to the processor and the selling price of the finished goods)[36] dur-

[35] District Courts, in granting injunctions against collection after the passage of Section 21(d), recognized the soundness of these claims of impossibility of proof, and their conclusions are equally applicable to Section 902. See, for example, *Baltic Mills Co.* v. *Bitgood*, 12 F. Supp. 132, 134; *Grosvenor-Dale Co.* v. *Bitgood*, 12 F. Supp. 416, 417, 418. A number of the District Court decisions were not reported.

[36] The term "margin" as used in Section 907 is a word of art and does not mean "manufacturing margin". "Margin" as used in Section 907 is determined by deducting from the gross sales value of all articles processed during a specified period the cost

ing the processing tax period, and the manufacturing margin during a specified "period before and after the tax". The "period before and after the tax", which is specified in Section 907, is the twenty-four months immediately preceding the effective date of the processing tax, August 1, 1931, to July 31, 1933, inclusive, and the six months, February to July, 1936, inclusive. We shall refer to this period as the "comparative period".

The theory of Section 907 is that the manufacturing margin would have been the same during the processing tax period, if the tax had never been imposed, as it was during the comparative period. Based upon this hypothesis, it would be presumed under Section 907 that a processor shifted the tax burden to others to the extent that the processor's manufacturing margin was greater during the tax period than during the comparative period. The processor would be presumed to have borne the entire burden of the tax in any case where his manufacturing margin during the tax period was not greater than during the comparative period.

If the conclusion which the presumption requires from the facts proved is so unreasonable as to amount to a purely arbitrary mandate, it is clear that the presumption is unconstitutional. This Court has time and again stricken down unreasonable presumptions. It has said that "a presumption that is arbitrary or that operates to deny a fair opportunity to repel it", violates the requirement of due process, *Western & A. Railroad* v. *Henderson*, 279 U. S. 639, 642; that "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment", *Bailey* v. *Alabama*, 219 U. S. 219, 239; and that a legislative

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of the commodity processed during the period and the processing tax paid with respect thereto. However, the basic principles of Section 907 are explained in the text by reference to "manufacturing margins", a term in common use among economists and statisticians.

presumption "must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed", *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43. And in the case of *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, this Court held invalid a state statute creating a presumption of participation in a monopoly based upon the systematic payment of lower prices within the state for sugar than were paid outside the state. Speaking through Mr. Justice Holmes, the Court said (p. 86):

> "As to the presumptions, of course the legislature may go a good way in raising one or in *changing the burden of proof*, but there are limits. It is 'essential that there shall be some *rational connection between the fact proved and the ultimate fact presumed*, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate' ". (Italics supplied).

It is submitted that the presumption created by Section 907 is invalid upon the basis of the foregoing authorities. Assume that the manufacturing margin of a particular cotton mill during the processing tax era was greater than its margin during the specified comparative period. Proof of such fact cannot conceivably support the inference that the processing tax burden was shifted by the mill to others.[37] Yet such would be the presumption under Section 907. To use the language of this Court, there is no "rational connection between the fact proved and the ultimate fact presumed."

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[37] It has been shown in the discussion under proposition II(B)(2), *supra*, that no human ingenuity can discover the numerical effect of any particular element of cost upon the price of cotton or the price of cotton goods. The same impossibility, of course, is encountered in any attempt to determine the numerical effect of any particular element of cost upon manufacturing margins.

The fundamental hypothesis on which the statutory presumption is based is that the manufacturing margin would have been the same during the processing tax period if the tax had never been imposed as it was during the comparative period. However, the reports of Government economists and investigators recognize that manufacturing margins are affected by numerous complicated circumstances, and that there is no such thing as a constant or normal margin, but that the margin of manufacture fluctuates widely from year to year.

In the *Report of the Chief of Bureau of Agricultural Economics* (1935), (Government Printing Office), it is said (p. 24):

> "The importance of the margin between prices received by farmers and prices paid by consumers for food and other farm products has increased since 1934 because of increased wages and increased costs of materials used in the transportation, processing, and marketing of farm products, because of processing taxes which have added to processors' costs, and because of changes in marketing methods (including the adoption of marketing agreements in several industries) which have affected costs and charges for the services needed in getting foods and other agricultural products from the farm to the consumer."

In the *Report of the President's Cabinet Committee on the Cotton Textile Industry* (1935), it was clearly recognized that there is no fixed margin in the cotton textile industry. The following statement is taken from the report:

> "Indeed, the price relationships during periods of rapidly changing prices, such as characterize cyclical fluctuations of business, indicate that a fixed margin does not obtain. * * * It is impossible to disentangle the effect of any individual element of cost upon selling price." *Senate Doc. No. 126*, 74th Cong., 1st Sess., p. 142.

The Department of Agriculture itself recognized that the incidence of the processing tax could not be determined from the changes in manufacturing margin or spread. In the *Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934*, it was said (p. 220):

> "The question 'who pays the processing tax' cannot be answered by a mere examination of the change in producer, wholesale and retail prices and in the final spread between them."

The Department of Agriculture further admits that the manufacturing margin of cotton mills would have increased after August 1, 1933, even if the processing tax had never been imposed. In the *Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934*, the Department says, with reference to the cotton textile industry (p. 236):

> "There was a fairly consistent downward trend in cotton manufacturers' margins from 1925-26 to 1932-33. A few months before the processing tax went into effect on August 1, 1933, these margins began to widen and in August, 1933, were greater than at any other time during the period covered by the data studied. *But the margins would have been increased during these months even if no tax had been imposed.* This is partly because cotton mills were operating under extremely low margins during most of the 1932-33 season, partly because *demand conditions made such an increase particularly easy to accomplish at that time*, and partly because costs of mill operation were greatly increased at about the same time the processing tax went into effect." (Italics supplied.)

While we cannot assign numerical values to any of the factors, we do know that a number of important circumstances other than the imposition of the processing tax which occurred in the tax period would have tended to increase manufacturing margins. For example, hours were

shortened and wages increased under the NRA; the soldier bonus was paid; the dollar was devalued and credit inflated; large sums were spent on public works and for relief; farm incomes were increased through benefit payments; trading on the stock and commodity exchanges increased; droughts and floods reduced surpluses and increased prices; business in the textile and various other lines was good.

On the other hand, it is common knowledge that the larger part of the comparative period represented the lowest ebb of the depression, and that the textile business was most seriously affected. It was pointed out in the *Report of the Department of Agriculture*, quoted above, that "cotton mills were operating under extremely low margins during most of the 1932-1933 season". And in the *Report of the President's Cabinet Committee on the Cotton Textile Industry*, it was stated that "In 1930, 1931, and 1932 the cotton textile industry as a whole showed serious losses". *Senate Doc. No. 126*, 74th Cong. 1st Sess., p. 141.

With these facts before it, it is difficult to see how the Department of Agriculture could in good faith propose,[38] as a test for determining the extent to which the processing tax had been shifted, a presumption based almost entirely upon the two-year period preceding the imposition of the tax. And yet that is the test which Section 907 prescribes.

Senator George said in the Senate with reference to this comparative period:

> "This period of 2 years, of course, as everybody knows, was when the country was at the very bottom of the depression. Necessarily the formula would work out against all claimants for refunds." *Cong. Rec.*, 74th Cong., 2nd Sess., Vol. 80, Part 8, p. 9078.

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[38] The paternity of the presumption brought into the law by Section 907 is unmistakable. The presumption of Section 907 was suggested by Secretary Wallace to the Senate Finance Committee when the Committee had under consideration the Revenue Bill of 1936. See Hearings before the Committee on Finance, United States Senate, 74th Congress, 2nd Sess., on H. R. 12395, pp. 851-853.

As a matter of fact, Congress itself recognized that the two-year period preceding the imposition of the processing tax could not be used as a fair basis for determining whether the processing tax had been shifted. In Title III, relating to the windfall tax, where Congress set up a similar presumption for determining shift, it rejected the two-year period and set up a six-year period "in order to give more equitable comparisons". The two-year period was also provided for in the first draft of Title III, relating to windfall tax, but the House extended the period to five years. In recommending the six-year period finally adopted, the Senate Finance Committee said:

> "In order to give more equitable comparisons, the representative period for determining the taxpayer's basic average profit margin (used in the prima-facie computation of the extent to which he shifted the burden of the tax) has been lengthened from 5 to 6 years." *Senate Rep. No. 2156,* 74th Cong. 2nd Sess., p. 25.

The Government in its brief in the Circuit Court of Appeals in the case of *Kingan & Co.* v. *Smith, Collector* (C. C. A. 7th, No. 6118), involving the windfall tax, *calls particular attention to the use of the six-year comparative period in Title III, and its discussion clearly indicates that the period from 1931 to 1933 would not be fair under any circumstances.* The Government there said (Br. p. 87):

> "To insure that this comparison is wholly fair to the taxpayer, the representative period consists of the six taxable years prior to the imposition of the tax. Section 501(f)(1). In the case of the appellant this includes two years (1927-1928, 1928-1929) at the peak of the business cycle, two of receding activity (1929-1930, 1930-1931) *and two at the trough of the cycle* (1931-1932, 1932-1933)." (Italics supplied.)

If the six-year period is necessary for a fair comparison in determining shift in the case of the windfall tax, why is the period at the trough of the depression considered fair in

connection with refunds of processing taxes? Perhaps it was considered that in the imposition of a recapture tax, some of the fundamentals of fairness must be adhered to, whereas in order to retain taxes illegally exacted, no consideration need be given to the fairness of a presumption, and any presumption can be adopted which will result in the retention by the Government of the illegal exaction.[39]

It should be noticed also that Section 907(e) states the condition upon which the presumption created by Section 907(a) may be rebutted. It is provided in subsection (e) that the presumption created by subsection (a) may be rebutted "by proof of the *actual extent* to which the claimant shifted to others the burden of the processing tax". Subsection (e) indicates a number of circumstances which might be included in such proof; but in order to rebut the presumption, subsection (e) requires "proof of the *actual extent* to which the claimant shifted to others the burden of the processing tax". The impossibility of producing such proof in any case has been demonstrated under a preceding heading. In providing that the presumption can be rebutted only by proof which is inherently impossible, subsection (e) in effect makes the presumption of subsection (a) an irrebuttable and conclusive one. Such a presumption is clearly repugnant to the due process clause of the Fifth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312; *Schlesinger* v. *Wisconsin*, 270 U. S. 230.

It is even provided in Section 907(e)(2) that if a claimant has processed products, in addition to the commodity with respect to which the processing tax was imposed, the Commissioner may determine that the burden of the tax on

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[39] Other inexplicable discrepancies appear in the presumptions set up in the supposedly complementary titles. Both titles use actual cost, but Title III uses actual selling prices, while Title VII uses theoretical selling price. Why should such differences appear in presumptions set up in the same act to prove the same facts, unless, as we contend, the presumptions were purely arbitrary and known to have no relation to the facts presumed?

taxable commodities has been shifted, in whole or in part, by means of transactions involving non-taxable products. It is provided in such a case that the same presumption, based upon comparative manufacturing margins, should be applied to determine *the extent to which the tax burden has been shifted in transactions involving non-taxable products.* This provision is further evidence of the grossly arbitrary character of the presumption created by Section 907.

(b) *Even if a defense of unjust enrichment were available, it would be unreasonable under the circumstances to transfer the burden of proof with respect to such subject to the processor.*

Even if the doctrine of unjust enrichment could constitutionally be extended by statute so as to bar recovery of a tax merely because the economic burden of the tax might have been passed on, the burden of proof as to the existence of such defense would in any event rest normally upon the defendant who asserts it. Title VII, however, shifts to the taxpayer the burden of negativing the existence of the facts upon which the defense would be based. This shifting of the burden of proof in a situation such as is here presented is so arbitrary and unreasonable that it lacks the essentials of due process. And its constitutionality clearly is not saved by the arbitrary presumption set up by Section 907.

The Government urged before this Court in the case of *Rickert Rice Mills, Inc.* v. *Fontenot, supra,* that it is reasonable to place such a burden of proof upon the taxpayer as the party "who has peculiar knowledge of the facts and who has those facts within his control". (Respondent's brief, p. 37). *As a matter of fact, none of the more important facts are within the taxpayer's knowledge or control.* Whether the economic burden of a tax has been shifted, in the sense in which economists generally use the

term, depends not upon facts relating to particular transactions of sale or to the operations of a particular taxpayer, but upon a comparison of the market price actually paid by the taxpayer for lint cotton and the market price actually received by him for finished goods with the *prices which would have prevailed* for the raw commodity and the finished goods if the processing tax had not been imposed. While clearly nobody can establish these facts, the Government is in a much better position than an individual mill to attempt such proof as can be made. The individual cotton mill, unlike the Government agencies, does not have access to the records of its competitors and does not have the facilities which the Government has for gathering statistical data and information from national and world markets. The only facts which the individual taxpayer has in his possession relate to his own purchases and sales, and this is a negligible part of the proof required.

Congress was not content simply to give to the Government by statute a right which it had not had before to defend against recovery of unconstitutional exactions by showing that the economic burden of the exactions had been passed on or back by the taxpayer, but in addition went further and relieved the Government from the burden of proving the facts to support the defense. It was fully recognized that the proof required was highly speculative and difficult, if not impossible, to adduce, and that in many instances where the tax burden may actually have been passed on, the Government could not make the required proof. The simple expedient was therefore adopted of transferring the impossible burden to the processor, thus insuring the retention by the Government of amounts which were absorbed by the processors as well as amounts which were shifted.

If Title VII were otherwise constitutional, it is submitted that this Court would be compelled to hold that Title VII constitutes an unconstitutional restriction upon the taxpayer's vested right by reason of placing this unreasonable

burden of proof upon the taxpayer. In the court below the Government sought to justify the shifting of the burden of proof upon the basis of authorities holding that the Commissioner's assessment of a tax is prima facie correct, and that on appeal to the Board of Tax Appeals the taxpayer must overcome this presumption.[40]

There is no analogy between a case involving the question whether a taxpayer overpaid his tax and a case where sums admittedly have been unconstitutionally exacted from a taxpayer, and an effort is made by retroactive legislation to bar recovery of the sums thus overpaid by the creation of a statutory defense of alleged unjust enrichment such as is provided in Title VII. In connection with the collection of taxes, the presumption of administrative correctness has been considered necessary to the proper administration of the tax law; and it is on the whole a fair rule, because most of the facts to be proved generally are facts largely within the knowledge of the taxpayer. On the other hand, it is clear that no public policy requires that the burden of negativing a retroactively created statutory defense to a vested right of action for unconstitutional exactions should be placed upon the taxpayer where the proof required is of facts not within his knowledge, and where the proof is most difficult and speculative, if not impossible, to adduce. The sanctioning of such a rule would permit all claims for unconstitutional exactions to be defeated merely by the imposition of burdens of proof which could not be met.

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[40] The Government cited the following cases: *United States* v. *Rindskopf*, 105 U. S. 418; *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (W. D. Ky.); *Wickwire* v. *Reinecke*, 14 F. (2d) 956; (C. C. A. 7th); *Mimnaugh* v. *United States*, 66 Ct. Cls. 411, cert. den. 280 U. S. 563; *Avery* v. *Commissioner*, 22 F. (2d) 6 (C. C. A. 5th); *Commissioner* v. *Field*, 67 F. (2d) 876 (C. C. A. 2d); *Westlake Public Market* v. *Commissioner*, 69 F. (2d) 291 (C. C. A. 9th); *Stiles* v. *Commissioner*, 69 F. (2d) 951 (C. C. A. 5th). But compare *Helvering* v. *Taylor*, 293 U. S. 507.

C. Even If No Impossibility of Proof Were Involved, There is No Legal, Equitable or Moral Basis for the Restrictions Imposed by Title VII.

The Government attempts to justify Section 902 of the 1936 Revenue Act as a Congressional recognition of the equitable doctrine of unjust enrichment, coupled with a shifting of the burden of proof on the subject to the processor. The same explanation was offered by the Government with reference to Section 21(d)(1) of the AAA, and the doctrine of unjust enrichment was relied upon as a defense to suits to enjoin the collection of the processing tax. The defense was rejected by this Court in those cases without any showing by the processor as to whether the economic burden of the taxes in question had been shifted to others. Such a defense is no better here than it was there.[41]

We shall show under this proposition, II(C), that there is no justice in respondent's so-called defense of unjust enrichment; that processors who obtain refunds will not be *unjustly* enriched at the expense of their customers even if part of the economic burden of the tax was shifted to such customers; that the processors may not be enriched at all; that in any event neither respondent nor the Government has any semblance of right to keep the illegal exaction and defeat recovery because of any supposed equities between processors and third parties; and that in any case where the circumstances would give rise to an equity in favor of third parties with whom the processor has dealt, Title VII effec-

[41] See Respondent's brief in *Rickert Rice Mills, Inc.* v. *Fontenot*, *supra*. It was there urged that (p. 35) "To permit the processors *to recover or retain* the amount of the tax which has been passed on or back would result in the unjust enrichment of a small class of private citizens, *i. e.*, the processors, at the expense of a vastly larger class, *i. e.*, the producers and consumers." (Italics supplied.)

tively prevents the processor from recovering a refund for the benefit of such third parties.[42]

1. If Processors Recover Refunds, They Will Not be Unjustly Enriched by the Mere Fact That They Might Have Shifted Part of the Economic Burden of the Tax to Others.

The absence of any legal, equitable or moral basis for the restrictions imposed by Section 902 may be demonstrated by a simple illustration.

Let it be assumed that a processor in 1935 sold his product at a lump selling price which represented the market price. We have demonstrated that it is impossible to determine the numerical effect of the processing tax upon prices. However, let it be assumed that on the particular sale the processor was actually able to charge 2c a pound more for his product, because of the existence of the processing tax, than he would have been able to charge if the tax had never been imposed, and that the total tax with respect to the processing of such article was 4c a pound, so that the processor had shifted half of the tax burden to the purchaser. Let it

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[42] In relying upon the doctrine of *unjust* enrichment in these cases, the Government has failed to show where any *injustice* is involved. The Government's concept of unjust enrichment at least does not involve any unethical or unlawful elements, but depends entirely upon the fact that the benefit of a tax saving, where the economic burden has been shifted, is an extraordinary and unexpected benefit. In a recent brief filed by the Department of Justice, it was said:

> "While *in no sense an unethical or unlawful source of income*, the practical effect of passing the burden of an unpaid tax on to the consumer or back to the producer is necessarily to produce an *unexpected and extraordinary source of income* which may aptly be described as *unjust enrichment*." Respondent's Brief, p. 45, *Kingan & Co.* v. *Smith*, C. C. A. 7th, No. 6118. (Italics supplied.)

In the present case it cannot be said that refunds of these taxes would constitute any *unexpected* benefit to petitioner, in view of the fact that *at the time of payment (of all except $8,000.00) petitioner protested to respondent that the taxes were illegal and unconstitutional.* (R. 19.)

be further assumed that the parties to the sale and the trade generally recognized the existence of the tax, and also recognized that the AAA was of doubtful constitutionality and that the tax might be refunded or avoided.

Under such circumstances the processor would be entitled under Section 902 to a refund of only one-half of the tax, being denied recovery of the other one-half on the theory that he would be unjustly enriched at the expense of his purchaser. However, it is clear that in such a case the processor could not be unjustly enriched at the expense of his customer by a recovery of the full amount of the tax. The processor would be no more unjustly enriched at the expense of the purchaser by the receipt of a refund than the purchaser would have been unjustly enriched at the expense of the processor if the tax had been upheld.

This principle is clearly illustrated in the recent case of *Casey Jones, Inc.* v. *Texas Textile Mills, Inc.*, 87 F. (2d) 454, decided January 15, 1937, by the Circuit Court of Appeals for the Fifth Circuit, the same court which decided the case at bar. In that case the contracting parties clearly recognized the possibility that the processing tax might be avoided. They contracted that a price adjustment should be made in the event that a decision holding the processing tax invalid should be rendered by this Court within 90 days of shipment. It appeared that the shipment had occurred 117 days before the decision of this Court in *United States* v. *Butler, supra*. The purchaser claimed that it was equitably entitled to recover the amount of the processing tax on the ground that it had put the processor in funds to pay the tax which it was not required to pay, and that the retention of the funds by the processor would result in unjust enrichment. The court held that the processor was not unjustly enriched and denied recovery.

And yet if the processor in the case just discussed had been forced to pay the illegal exaction to the collector, Section 902 would apparently deny him a refund unless he could show that the price charged was not greater, because of the

existence of the processing tax, than it would have been if the processing tax had not been imposed. If the economic burden of the tax had thus been shifted by the processor, he would be denied a refund although clearly there could be no conceivable basis of charging unjust enrichment.

It is fundamental in the legal and economic system under which we live that when goods have been sold at a flat price and the parties have been content to trade at that flat price without segregating out any of the elements of cost, it is no concern of the purchaser whether the seller has made a good or a bad bargain. If the sales price has been fixed on a market which was overestimating the costs of production, the seller benefits. If the price has been fixed on a market which was underestimating costs of production, the seller loses. But no injustice has been done in either case. The parties knew at the time that one party or the other might gain by reason of a miscalculation of costs. They were free to provide, by an express contract provision, for price adjustments depending upon the final ascertainment of any *uncertain* element in the seller's costs. But if they made no such contract, it is not the business of the Government or the courts to make over the contract for them, no matter which party to the contract may profit beyond his expectations.

There is no more reason for upsetting the agreement of the parties in a case where a processing tax has been avoided than there would be in a case where the seller has secured a refund of ad valorem taxes, a return of freight overcharges or a reduction of freight rates, relief from an anticipated obligation to pay patent royalties, the benefit of new and unexpected labor saving devices, or of a reduction in any other of the elements of cost.[43] If the market has

[43] The Treasury Department recognized that the processing tax "becomes an indivisible part of the (processor's) production cost, similar to the manner in which other expenses such as depreciation, interest on capital invested, and taxes paid to the state, are incident to the conduct of a manufacturing business and enhance the cost of articles produced." See Treasury letter quoted in Appendix, p. 106.

overestimated any of these items, the seller profits. On the other hand, if any of these elements of cost have been underestimated, the seller suffers. But in either case both parties get what they contracted for.

There are some situations where a processor may be enriched unjustly at the expense of his customers if allowed to recover *and retain* refunds of processing taxes. Such a situation would exist where a processor had sold goods at a certain price "plus the processing tax attributable to the goods" in a named amount, where the tax was billed as a separate item, and where both parties to the sale mistakenly assumed that the tax was valid and would not be refunded by the Government. *Wayne County Produce Co.* v. *Duffy-Mott Co., Inc.*, 244 N. Y. 351.

In the *Wayne County Produce Co.* case, just cited, it appeared that a cider manufacturer had sold cider at a price of "14½ cents per gallon • • • plus the manufacturer's war tax of 10 per cent". The tax was collected and paid to the Federal Government, but was later refunded on the ground that the taxing act was not properly applicable to sales of cider. The court construed the transaction between the parties as one whereby the purchaser agreed "to pay a stated price, and to put the seller in funds for the payment of a tax besides". In holding that the purchaser was entitled to the refund which was made to the seller, Chief Judge Cardozo, writing the opinion of the court, said (p. 354):

> "Annulment of the tax after the sale and the delivery of an invoice, but before the payment of the price, would have extinguished the seller's right to exact payment from its customer of the added 10 per cent. Payment, if then exacted, would have been no longer payment for a tax, but payment for something else. By the same token, annulment at a later date, when followed by the refund of the tax and the undoing of the whole transaction between the seller and the Government, leaves the money applicable to the same use as if the invalidity of the impost had been declared at the beginning • • •.

> "The distinction is unimportant, at least for present purposes, between mistakes of fact and those of law. The quality of the mistake did not prevent the defendant from recovering the money from the Government. It cannot absolve from the duty of disposing of the money thus recovered as good conscience shall dictate."

However, an entirely different situation is presented where a taxpayer sells taxable products at a *flat price* without having the tax segregated and paid as such by the purchaser to the seller. This was the normal way in which processors sold their products. It is possible that in such a case the selling price may have been increased, because of the existence of the processing tax, over the price which would have been charged if there had been no processing tax. Nevertheless the purchaser does not pay the tax. All that he pays is the purchase price to obtain the goods. If the tax is never paid, or if it is paid and refunded, there is no basis for implying any promise to make a price adjustment.

In a case where a taxpayer had sold taxable goods at a flat price, this Court recognized that the seller would not be collecting the tax from the purchaser although the price had been increased because of the tax. *Lash's Products Co.* v. *United States*, 278 U. S. 175. In that case Mr. Justice Holmes, writing the opinion of the Court, said (p. 176):

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all * * *. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else."

Chief Judge Cardozo, writing the opinion of the Court of Appeals in the *Wayne County Produce Co.* case, *supra*,

recognized that the case before him was distinguishable from a case where the taxpayer had sold taxable goods at a flat price. The Chief Judge said:

> "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore v. Des Arts, 1 N. Y. 359." 244 N. Y. at 353.

In the absence of a controlling contract provision relating to the processing tax, a processor who has sold his products at a flat price is under no legal or equitable obligation to account to his customers for any refunds that he may obtain. *Casey Jones, Inc.* v. *Texas Textile Mills, Inc., supra; Texas Co.* v. *Harold*, 228 Ala. 350; *Moore* v. *Des Arts*, 1 N. Y. 359. And see *Wayne County Produce Co.* v. *Duffy-Mott Co., supra.* In *Casey Jones, Inc.* v. *Texas Textile Mills, Inc., supra*, the court said (p. 456):

> "In sales of this kind, if the price agreed upon is understood by the parties to exclude the tax, and the buyer agrees to put the seller in funds for payment thereof, and later the seller is relieved of the duty of paying the tax, the buyer is entitled to recover the amount paid in excess of the price. Wayne County Produce Co. v. Duffy-Mott Co., 244 N. Y. 351, 155 N. E. 669. However, if there be no agreement concerning the tax, no such right accrues to the buyer, even though the price paid includes a tax erroneously believed by the seller to be due. Lash's Products Co. v. United States, 278 U. S. 175, 49 S. Ct. 100, 73 L. Ed. 251, citing Heckman & Co. v. I. S. Dawes & Son Co., 56 App. D. C. 213, 12 F. (2d) 154. In the first case the tax is separate and apart from the contract price, while in the latter the tax is said to be buried in the price. These results have been reached in cases where the parties did not enter into any agreement concerning their rights in the event of the invalidity of the tax. Their intentions and obligations have been determined from the form of the transaction and the situation of the parties."

It is submitted that even if a processor has been able to shift the economic burden of the tax to customers, he would not for such reason be unjustly enriched upon the receipt of a refund. Where a seller of taxable articles collects the tax as tax from his customer, it might be correct to make the seller hold any refund of the tax for the account of his customer.[44] However, Section 902 clearly is not confined to such a situation. In denying refunds merely on the ground of a shift of the economic burden of the tax, Section 902 cannot be regarded as a statutory embodiment of the doctrine of unjust enrichment.

2. *Section 902 Fails to Recognize Heavy Burdens and Actual Damage to Processors Resulting from the Unlawful Imposition of Processing Taxes.*

Even where taxpayers are able to shift a tax on to purchasers of their products, economists recognize that the taxpayers themselves often suffer substantial economic burdens and direct financial damage from the imposition of the tax. Thus where a sales tax can be shifted on to purchasers in every transaction of sale, the seller may find his market greatly reduced. The increased prices which the seller charges will discourage some purchasers from buying.[45] The decrease in sales will require curtailment in production with the consequent increase in the cost of producing each unit sold. The processor might thus be seriously damaged, even though he had succeeded in shifting the tax in the case of all sales actually made.

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[44] Of course the seller will not be unjustly enriched if he must hold any refunds for the account of the buyer. *Van Antwerp v. State*, 218 N. Y. 422.

[45] *The President's Cabinet Committee on the Cotton Textile Industry* (1935) says: "Insofar as the prices of cotton textiles have been increased in consequence of the processing tax, sales have been to some extent reduced below what they would have been in the absence of the tax as an element of cost." *Sen. Doc. No. 126*, 74th Cong., 1st Sess., p. 141.

Furthermore, any increase in the price of manufactured products may cause a shift in consumption to other classes of products. This situation was recognized in the original AAA, Section 15(d) of which provided:

> "The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors or producers thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds * * * that such disadvantages in competition exist * * *. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, * * *."

It will be noticed that the shift in consumption away from the taxable commodity had to be *excessive* before the Secretary was authorized to impose a tax on competing commodities. The Secretary did make provision for a compensating tax upon the processing of paper into paper bags and jute fabric into jute bags, products which were found to be competing with cotton bags, resulting in an excessive shift in consumption to paper and jute bags. See *T. D. 4495.*

However, no such compensating tax was ever imposed upon the processing of rayon, although it is a matter of common knowledge that rayon products do compete with certain cotton products. And if any part of the tax on the processing of cotton was shifted to purchasers of such cotton products in the form of increased prices, this circumstance necessarily had the tendency to cause a shift in consumption from cotton to rayon products, with the consequent pecuniary and economic loss to cotton manufacturers.

This is damage of a definite and real kind which pro-

cessors suffered from the unlawful imposition of the processing tax, even if they succeeded in shifting the entire tax on the goods involved in each particular sale actually made. Damage of this kind is called the "pressure" of the tax. Economists recognize that it can be very substantial in the case of some taxes and *may even involve more loss to taxpayers than the amount of tax collected by the Government.* See the introduction to Seligman, "*The Shifting and Incidence of Taxation*" (5th ed. 1926), p. 11 et seq.

Even though a processor has thus suffered substantial damage in the loss of market resulting from the imposition of the tax, Section 902 and the presumption established by Section 907 clearly deny him any recovery if he has succeeded in shifting the burden of the processing tax on the goods actually sold. In denying refunds in such cases, Title VII clearly does not involve an application of the doctrine of unjust enrichment or of any other equitable doctrine.

The colloquy between Senator Hastings, Secretary Wallace and Senator Bailey during the hearings before the Senate Finance Committee on the Revenue Bill of 1936, which is set forth in the margin,[46] shows clearly that it was recog-

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[46] "Senator Hastings. Mr. Secretary, if the processor did only half as much business as he did in former years, after the tax was put on, and the margin of profit was the same, he might very well be making very much less for his concern, might he not?

"Mr. Wallace. I think that would be an axiom, if he did only half as much business and had a small volume, he would be making less than half as much.

"Senator Hastings. Then if your rules of determining the facts are based solely upon the difference in the margin, is that a correct rule in order to determine whether or not the processor is entitled to a return of his tax?

"Mr. Wallace. I do not think the Government would be responsible for the volume of the business done.

"Senator Bailey. The Government would not be responsible for the volume, but the increased taxes and the prices reduced the volume, and I think that should be a factor that should be taken into account.

"Mr. Wallace. I think you should take it into account.

"Senator Hastings. Is your amendment drawn so that it can be taken into account?

nized that Title VII was so drafted as to give no consideration to this substantial element of damage to processors.

It is true that the kind of damage which we are here considering, that resulting from the "pressure" of the tax, is speculative and that the extent of such damage is impossible to determine. Nevertheless such damage is no more speculative than is the extent to which the tax burden has been shifted. It is certainly not *equitable* to take one of these speculative elements into consideration and not the other, as a basis for reducing the measure of recovery, effective at the time the cause of action arose.

3. *Any Unjust Enrichment of Petitioner at the Expense of Third Parties Would Not Justify Respondent's Retention of Unconstitutional Exactions.*

In urging that Title VII affords a defense based upon unjust enrichment, the Government does not contend that processors will be unjustly enriched at the expense of the Government if they recover amounts illegally exacted from them. The Government's argument is that processors will be unjustly enriched *at the expense of third parties,* that is, the vendors of their raw products or the vendees of their finished goods, if any portion of the economic burden of the tax was shifted to them.

Clearly the Government cannot defend, and cannot authorize the respondent to defend, against the refund of sums unconstitutionally exacted from processors because of any supposed equities between the processors and third persons. That is no business of the Government or the respondent. The simple fact is that the respondent has without authority exacted sums from petitioner under the supposed authority of an unconstitutional law and a right of action for the recovery of those sums immediately vested

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"Mr. Wallace. I do not think the amendments are drawn to take that particular point into account." *Hearings before Committee on Finance, U. S. Senate,* 74th Cong., 2nd Sess., on H. R. 12395, pp. 862, 863.

in the petitioner. That right of action cannot be stricken down even if the petitioner may have so conducted his business as to have passed on the economic burden of a portion of said amounts to other persons. Such matters have nothing whatever to do with the Government's duty to refund to petitioner the sums which it has been wrongfully compelled to pay.

As a matter of fact, respondent is in no better position to invoke the equitable doctrine of unjust enrichment in the defense of these actions than a collector of internal revenue would be who had failed to pay over the processing tax into the Treasury. The collector, of course, would have absolutely no legal or equitable claim upon such funds. *Neither has the Government.*

The theory of defense which respondent invokes to justify Section 902 could be just as properly made available to any wrongdoer; even to a racketeer sued by a merchant for the recovery of "protection money" illegally exacted. If such exaction was made generally from all merchants in the community handling the same products, the exactions may have resulted in an increase in price which made it possible to shift a large portion of the economic burden of the illegal exactions to purchasers. And yet no one would suggest that such a wrongdoer should be permitted to retain such illegal exactions on that ground, even if he were a Robin Hood who distributed his spoils generously and intelligently among the most deserving.

In the case of *Southern Pacific Company* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, this Court held that a shipper's right to recover excessive freight rates collected by a carrier could not be defeated or impaired on the ground that the shipper was able to pass on the damage to others in the way of increased prices. As this Court there said (p. 534):

> "The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum."

In the later case of *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, this Court again held that the shipper could recover excessive freight charged by a carrier, although the shipper had sold the transported goods f. o. b. destination and the purchaser actually paid the freight to the carrier and deducted the amount from the shipper's invoice. Mr. Justice Brandeis, writing the opinion of the court in that case, said (p. 238):

> "On goods sold f. o. b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. • • • The purchaser who paid the freight did so solely as agent for the seller. The carrier did not know of the provision in the sales contracts. *With the rights or equities as between seller and purchaser it had and has no concern*, nor need we concern ourselves with them." (Italics supplied).

The attempt by respondent to defeat the right of processors to recover back taxes illegally collected from them because of transactions with third parties would be not unlike the attempt to defend any other action for the recovery of money illegally exacted, because the plaintiff had been reimbursed for his loss by an insurer or by the gift of a sympathizing friend. Cf. *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79; *Olds* v. *Mapes-Reeves Const. Co.*, 177 Mass. 41; *Nashville, Chattanooga and St. L. R. Co.* v. *Miller*, 120 Ga. 453, 455.

The situation might be different if the supposed unjust enrichment had moved the Government to provide an adequate machinery to safeguard any equities of third parties, but Title VII clearly does not do this. No provision whatever is made for a refund to a vendor of a raw commodity who may have borne the burden of the tax. Even if the taxpayer has reimbursed the vendor for the tax shifted back to him, he cannot recover under Section 902.

The provision of Section 902(b), which purports on its face to protect the vendees of processors to whom the bur-

den of the tax may have been shifted, is a mockery and a sham. It cannot be expected (or even dreamed) that the processor will first make an unconditional payment to his vendee of any amount which may have been shifted to such vendee, and run the risk of establishing under Section 902(b) that such vendee did not shift the burden of the tax on to his own vendee.[47]

In other words, it is clearly apparent that Title VII has as its main purpose the retention by the Government of most of the processing taxes unconstitutionally exacted, and that it does not in any sense represent an effort on the part of the Government to insure that refunds made by it shall go to the persons who bore the economic burden of the tax. It attempts to make use of the supposed equities between the processor and his customers as an excuse for securing to the Government the fruits of its unconstitutional exactions. If in any case, a taxpayer who received a refund of such exactions would be unjustly enriched at the expense of his customer, the most that Congress could do would be to insure that any refund secured by the taxpayer should go to the person equitably entitled to the benefit of it. Congress certainly could not make such *supposed* equities of third parties the basis for striking down the seller's vested right for the recovery of taxes illegally collected from him and free the Government and its officers of all liability to any one on account of the unconstitutional exaction.

The argument which we have been making under proposition II(C) is based upon the assumption that no impossi-

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[47] The requirement that the processor pay the amount to his vendee unconditionally and then run the risk of getting a refund from the Government is to be contrasted with the procedure outlined in Section 424 of the 1928 Act, which was involved in the case of *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386. That case and the statutory provisions there involved are explained fully under proposition II(D), *infra*. Section 424 would authorize refunds to a manufacturer, where the manufacturer had repaid the amounts to their vendees, without any showing as to what such vendee did with the money or where a bond was given conditioned upon the repayment of the amount to ultimate purchasers.

bility of proof is involved in determining the extent to which the tax burden has been shifted. However, we have shown under proposition II(B) that such proof is inherently impossible. In view of the impossibility of determining the portion of the tax shifted and the portion absorbed by the processor, the processor would have a-better equity to the fund which was exacted from him than the wrongdoer, namely, the collector who collected the illegal tax or the Government which retains it without claim of right. Cf. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251; *Solomon* v. *Township of Oscoda*, 77 Mich. 365.

(D) The Jefferson Electric Co. Case Is Clearly Distinguishable

Respondent has relied upon the authority of *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, and the District Court rested its decision upon the authority of that case. In that case this Court upheld the validity of Section 424 of the Revenue Act of 1928,[48] which Section imposed conditions upon the refund of certain *sales taxes* which had been erroneously collected by the Government on goods not covered by the taxing Act. Section 424 provided that the vendor, who had made such erroneous payments to the Government, could recover them only by showing either that he had not collected the amount of tax from his vendees, or that if he had collected it, that he had repaid it to them, or in the alternative, that he had given bond conditioned upon such repayment to the ultimate purchasers within a reasonable time after receipt of the refund.

We submit that the *Jefferson Electric Co.* case is clearly distinguishable from the case at bar. In the first place, it seems apparent that in the *Jefferson Electric Co.* case, this Court considered that Section 424 imposed restrictions on the taxpayer's right to refund only in cases where the taxpayer had *collected the tax as a separate item* under circumstances

[48] See Appendix, *infra*, p. 100.

which would give rise to a quasi-contractual or implied contract right in favor of the purchaser against the taxpayer in the event that the taxpayer should obtain a refund. Cf. *Wayne County Produce Co.* v. *Duffy-Mott Co., Inc., supra*, pp. 55-57.

In such cases Section 424 operated on the taxpayer's legal rights in a manner similar to a real party in interest statute. The holder of the bare legal right to refund *in such cases* could not complain of the restrictions, since he would be required, apart from statute, to hold any refund for his customers' account. Section 424 simply provided procedural machinery to insure the payment of the refunds to the parties beneficially and equitably entitled thereto. It will be shown that this was the view which the Government urged and which was adopted by this Court.

The only argument in support of the constitutionality of Section 424 which was made in any of the briefs filed by the Government in the *Jefferson Electric Co.* group of cases, was expressly based upon the proposition that in cases covered by Section 424 purchasers would have a quasi-contractual right against the taxpayer to share in any refunds of the tax. The Solicitor General there urged:

> "If a manufacturer had not borne the burden of the tax but had collected it directly from the consumer, then the manufacturer, if he obtained a refund, would be *liable to the consumer in an action based on quasi-contract*. (Italics supplied.) • • • The effect of the statute, therefore, was to deprive the taxpayer of its *legal* right to a refund if the taxpayer was not in fact and in law *beneficially* entitled to it." (Brief, *American Chain Co.* v. *Eaton*, pp. 13, 14.)

The Government did not suggest in its argument that the prohibition of Section 424 was applicable to a case where a taxpayer would not be liable over to others in the event that he should obtain a refund. That this Court did not intend to go beyond the Government's argument is indi-

cated from the following passage taken from its opinion in the *Jefferson Electric Co.* case (p. 402):

> "But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
>
> "We do not perceive in the restriction any infringement of due process of law. • • • Statutes made applicable to existing claims or causes of action and requiring that suits be brought by the real rather than the nominal party in interest have been uniformly sustained when challenged as infringing the contract and due process clauses of the Constitution."

It is submitted that this Court based its decision in the *Jefferson Electric Co.* case upon the ground that Section 424 simply made effectual the pre-existing rights of the taxpayer's vendees, and deprived the taxpayer of nothing which he would have been entitled to *retain* against the claims of his vendees.

This view of the Court's decision in the *Jefferson Electric Co.* case is confirmed by the factual background. The tax involved in the *Jefferson Electric Co.* case was a sales tax measured by a fixed percentage of selling price. In order to effect a saving in the amount of tax payable to the Government, manufacturers had followed the general practice of undertaking to collect the tax as such from their vendees, as an item separate from the stated purchase price. Where this procedure was followed, the Treasury recognized the parties' treatment of the amount paid by the vendee as part purchase price and part tax, and allowed the tax to be computed on the basis of the stated purchase price. Thus the total tax paid was less than it would have

been if measured by a percentage of the entire amount paid by the vendee. See Regulations 47, Article 3, quoted in the Appendix, *infra*, p. 103. In the light of this general practice, sanctioned by the Treasury Regulations, Section 424 was enacted and undertook in terms to condition refunds only in cases where the taxpayer had collected the tax from his vendee.

Under the circumstances it is clear that, in sustaining section 424, this Court considered that section as applying only where a taxpayer had collected the tax as such from his vendees and where the taxpayer would be required to hold any refunds for their account. The Government would be the first to deny that Section 902 should receive such a limited construction; *since processors did not generally collect the processing tax as such from their vendees, but on the contrary sold their goods at a flat price.* In such cases, as we have shown in proposition II(C)(1), the processors' vendees would have no equitable claims to the refunds even though the economic burden of the tax was shifted to them. Section 902 therefore cannot operate as a real party in interest statute.

In several places in the opinion of the Court Mr. Justice Van Devanter uses the expressions "shifted the burden" and "borne the burden". However, it is clear from a reading of the opinion as a whole that the Court did *not* interpret Section 424 as imposing a restriction on refunds on the basis of the taxpayer's having shifted the *economic* burden of the tax, which seems clearly to be the general purpose of Section 902. In referring to cases where the taxpayer had "shifted the burden" and "borne the burden", Mr. Justice Van Devanter clearly was referring to cases where the taxpayer had or had not *collected the tax as such from vendees.* This is made clear from the following statement made in the course of the opinion (p. 402):

> "If the taxpayer has borne the burden of the tax, he readily can show it".

It is inconceivable that the Court would suggest that there was *no difficulty* in determining whether a taxpayer had *shifted the economic burden of the tax.*[49] Even the Government will not claim that such a question can be "readily" answered. We have shown, under proposition II(B) (2), *supra,* that it is not only difficult, but actually impossible, to ascertain whether or to what extent the economic burden of the tax has been shifted.

In none of the briefs for taxpayers or the Government in any of the cases on the *Jefferson Electric Co.* group was any suggestion made that there would be any impossibility, or any difficulty, of proof in establishing the conditions laid down by Section 424.[50] This shows clearly that the parties did not consider that those cases involved any question as to *who bore the economic burden of the tax.*

(E) Section 906 Does Not Afford a Fair Administrative Remedy on Claims for Refund of Processing Taxes.

We may concede, for purposes of argument, under this proposition, that Congress could strike down petitioner's vested right of action against the collector if an equivalent substitute be provided.[51] It may be granted further for

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[49] This Court has apparently drawn a distinction between sales taxes and manufacturing taxes, with respect to the directness or indirectness of the shifting of tax burdens. See *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. Cf. *Wheeler Lumber B. & S. Co.* v. *United States,* 281 U. S. 572; *Liggett & Myers Tobacco Co.* v. *United States,* 81 L. ed. adv. ops. 215. Mr. Justice Van Devanter wrote the opinion of the court in the two cases first cited, as well as in the *Jefferson Electric Co.* case. The distinction which he has drawn would indicate that whatever his views might be as to the facility of showing a shift in the burden of a *sales tax,* he would recognize that the possibility of shifting a *manufacturing or processing tax* would present a different question.

[50] In the taxpayer's brief in No. 171, page 16, it was said: "The question whether the tax has been 'passed on' to the customer is one of fact readily susceptible of proof and judicial determination."

[51] We have argued under proposition II(A), *supra,* that the collector's personal liability cannot be destroyed regardless of whether any alternative remedy is provided.

purposes of argument that the substituted remedy need not be judicial,[52] but that a fair *administrative remedy* may constitute due process of law. We may also assume for the present argument that an administrative tribunal is able to determine the extent to which the tax burden has been shifted,[53] and that such shifting results in unjust enrichment, which constitutes an equitable defense to refund proceedings.[54] We urge here that, even if all this be conceded, the administrative remedy provided in Title VII is not a fair administrative remedy and does not constitute due process, and that in any event it is in no sense equivalent to the remedy which it seeks to displace. Petitioner's right of action certainly cannot be destroyed under the Fifth Amendment by substituting an *unfair and inadequate* administrative remedy.

Section 906 of the 1936 Revenue Act undertakes to lay down the exclusive method of procedure on claims for refund of processing taxes. It is there provided that the Commissioner shall allow or disallow claims within three years after they are filed. Section 906(b) provides for the creation of a so-called "Board of Review" in the Treasury Department. This "Board of Review" is given jurisdiction "to review the allowance or disallowance of the Com-

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[52] Due process of law requires that a judicial remedy be afforded at some stage in a case of disputed tax liability. *Phillips* v. *Commissioner*, 283 U. S. 589, 595, 597. This should be especially true where, as here, the dispute entrusted to the administrative tribunal is not as to the illegality of the exaction but as to the effect, upon the taxpayer's right to recover for an admittedly illegal exaction, of dealings between the taxpayer and third parties in which the Government is no way involved, and especially where the administrative remedy *is substituted for a vested right of action which had already arisen against a collector for an unconstitutional exaction.*

[53] We have demonstrated under proposition II(B) (2), *supra*, the inherent impossibility of ascertaining such fact.

[54] We have shown under proposition II(C), *supra*, that no defense can be based upon the shifting of the tax burden, even if proof of the extent of the shift were possible.

missioner of a claim for refund, and to determine the amount of refund due any claimant".

Section 906(c) provides that where a claim has been disallowed, the claimant may file a petition with the Board of Review, requesting a hearing on the merits of the claim. Section 906(d) provides that each such hearing shall be conducted, *not* by the Board of Review, nor even a division thereof, but by a "presiding officer" *who shall be an officer or employee of the Treasury Department*, designated a "presiding officer" by the Secretary of the Treasury.

Section 906(e) provides that the so-called "presiding officer", who conducts the hearing, shall *recommend* findings of fact and a decision to the Board, and that the Board, or a division thereof, shall make its findings of fact and decision in writing. The Board, or a division, which makes the actual findings and decision, is not required by the statute to consider the evidence. It is not even provided that a record of the evidence upon which the findings are recommended be submitted to the tribunal which makes the decision.

It is submitted that the procedure contemplated by Section 906 does not satisfy the requirements of a full and fair administrative hearing, as laid down by this Court in *Morgan v. United States*, 298 U. S. 468. Section 906 does not provide any "safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." In order to have fair administrative procedure, "*The one who decides must hear*". 298 U. S. at 480, 481.[58]

Moreover, the Board of Review is not an *independent* administrative agency like the Board of Tax Appeals, but is

[58] "It seems absurd that one official should hold a public enquiry into the merits of a proposal, and that another official should be entitled, disregarding the report of the first, to give a decision on the merits." Hewart, "*The New Despotism*", p. 51.

on the contrary *required* by statute to be composed wholly of employees and subordinate officials of the Department, which is the claimant's adversary in the proceeding.[56] The Treasury Department should not be allowed to be judge in its own case. Cf. *Tumey* v. *Ohio*, 273 U. S. 510, and see *Report of Special Committee on Administrative Law, American Bar Association* (1936), Advance Program, pp. 214-225. A proceeding before such a tribunal is certainly no equivalent of petitioner's remedy against the collector which it seeks to displace.

It is therefore submitted that the so-called remedy afforded by Section 906 is not a valid administrative remedy in any sense of the term, and does not comply with the requirements of due process of law. Even if as to future transactions Congress could constitutionally limit taxpayers to such an administrative remedy for the recovery of taxes illegally collected, nevertheless it should be clear that *Congress cannot strike down a vested right of action at law against a collecter and substitute this kind of remedy in its place.*

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[56] As Lord Chief Justice Hewart has said: "One would have thought it perfectly obvious that no one employed in an administrative capacity ought to be entrusted with judicial duties in matters connected with his administrative duties. The respective duties are incompatible. It is too much to expect in such circumstances that he should perform the judicial duties impartially. Even if he acts in good faith, and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind, as everybody who has had dealings with public officials knows, to bear on the matter he has to decide. More than that, it is his duty, as an official, to obey any instructions given him by his superiors, and in the absence of special instructions, to further what he knows to be the policy of his Department. His position makes it inevitable that he should be subject to political influences." Hewart, *"The New Despotism"*, p. 46.

III.

Sections 903, 904 and 906 Are Inseparably Connected With the Unconstitutional Provisions of Section 902.

Section 902 is the axis of Title VII. If that Section is unconstitutional, then Title VII falls as a whole.[57]

Section 903 requires the filing of new claims for refund after the enactment of the 1936 Revenue Act. Section 904 provides that suits for the recovery of AAA taxes other than processing taxes shall not be brought before the expiration of eighteen months from the filing of a claim under Title VII. It is clear from a consideration of the provisions of Title VII as a whole, and also from the legislative history, that both of these Sections were enacted solely upon the assumption that Section 902 was constitutional, and that the Commissioner would be required to pass upon the question as to whether the tax burden had been shifted by individual claimants.[58]

The same is true of Section 906, which prohibits court action for the recovery of amounts collected as processing taxes and provides for a proceeding before the Board of Review, as explained under proposition II(E), *supra*. The Congressional Committees[59] explained that the necessity

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[57] See *Lynch* v. *United States*, 292 U. S. 571, 586; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241, 242; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, 305; *Dorchy* v. *Kansas*, 264 U. S. 286, 289, 290; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 361, 362; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312, 313.

[58] The Congressional Committee said: "It is, therefore, necessary that new claims be filed so that each claimant's right to secure a refund may be established in accordance with the procedure set forth under title VII. Section 903 gives the Commissioner the authority to prescribe the number of claims which may be filed by any person. • • • In order, therefore, to obtain a proper determination of the incidence of taxes paid with respect to such commodities, it is necessary that the Commissioner be permitted to require that a single claim be filed with respect to the taxes paid with respect to such commodities." *Senate Rept. No. 2156*, 74th Cong., 2nd Sess., pp. 34, 35. *House Rep. No. 2818*, 74th Cong., 2nd Sess., p. 4.

[59] See *Senate Rep. No. 2156*, 74th Cong., 2nd Sess., p. 33. *House Rep. No. 2818*, 74th Cong., 2nd Sess., p. 2.

for such special statutory proceedings is due to the "extremely complicated economic and accounting considerations" involved in the question as to whether processing taxes were passed on. Section 906 is simply an adjunct to Section 902, which provides that no refund of any amount paid as tax under the AAA shall be allowed, "unless the claimant establishes to the satisfaction of • • • the Board of Review in cases provided for under Section 906 • • • that he bore the burden of such amount."

The necessary dependence of these procedural provisions of Title VII upon the essential provisions of Section 902 eliminates any question of an attempt by Congress to curtail the jurisdiction of the Courts in these cases. There is certainly no basis for suggesting that Congress has attempted in Title VII to exercise its peculiar control over the jurisdiction of inferior Federal courts. No distinction is made in Title VII between State and Federal courts, and it would be ridiculous to suppose that Congress intended to amend the jurisdictional statute[60] so as to exclude these cases from the District Courts if they may still be maintained in the State Courts.

IV.

The Absurd and Dangerous Consequences of Respondent's Defense Demonstrate Its Fallacy.

The fallacy of the argument on which the Government relies in justification of Title VII, and the absurd and dangerous consequences to which it leads are readily apparent if we consider briefly "the scope of the principle for which the Government contends" and "test the principle by its applications" and observe "that, by the exercise of the asserted power, Congress would, in effect, under the pretext of" regulating matters of procedure and burden of proof, "in reality accomplish prohibited ends"[61] namely, the de-

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[60] Section 24 of the Judicial Code as Amended, 28 U. S. C. A. Sec. 41.

[61] *United States* v. *Butler*, 297 U. S. 1, 77.

nial of all remedy for the illegal collection of taxes and the destruction of vested rights of action against the United States and its officers for sums unconstitutionally exacted.

If the principle of Title VII is upheld, can there be any doubt that Congress will time and time again invoke the same means of enabling the Government to collect and retain illegal exactions of all kinds? In the future, as other novel legislation is passed imposing heavy exactions upon citizens, large sums will be collected for the Government while injunctions are resisted on the ground that there is a plain, adequate and complete remedy recognized by the Revised Statutes for the recovery back of internal revenue taxes illegally collected. When the refund actions get to a dangerous point, Congress will again undertake to limit the right of recovery to those cases where the plaintiffs can establish the existence of certain conditions by proof which is highly speculative, difficult and expensive, if not impossible. The Government would thus be able to retain at least a very large percentage of any illegal exactions.

By following such steps as those outlined, Congress would in effect be able to destroy all remedy for the wrongful collection of large amounts of taxes.[82]

If this procedure can be followed in dealing with processing taxes it is difficult to suggest any reason why it cannot be applied in any other case where Congress wishes to apply it. If it should appear that great sums of income taxes have been collected under some unconstitutional provision of a Revenue Act, Congress might impose the same kind of condition on the recovery back of such taxes. Economists explain that there is probably a difference in the extent to which income taxes, as distinguished from excise taxes, can be shifted to others, but they recognize that some income taxpayers are able to shift at least part of the tax

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[82] Due process of law requires that some effective remedy be afforded for the illegal collection of taxes. *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17. See discussion *supra*, p. 11.

burden to others,"[83] and it would, of course, be impossible to show the extent of the shift.

Congress might attempt at some future time to impose a direct tax on real estate (in some sort of disguise of course) without making any attempt to comply with the constitutional requirement of apportionment. *After* the tax is collected, the refund statutes could be amended so as to deny refunds unless the taxpayer carries the impossible burden of showing that he absorbed the tax. Merchants and manufacturers owning and occupying property subject to the tax would be deprived of a refund because of their inability to show the extent to which the tax may have affected their purchase and selling prices and the wages paid to their employees.

The examples suggested "are no more improbable than would the present act have been deemed a few years ago".[84]

CONCLUSION.

It is submitted that Title VII of the Revenue Act of 1936 is unconstitutional and void, that petitioner's complaint sets forth a cause of action, and that the judgments of the lower courts were erroneous and should be reversed.

Respectfully submitted,

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[83] See Fagan & Macy, *"Public Finance—Selected Readings"* (1934), pp. 255 *et seq.*; Lutz, *"Public Finance"* (2d ed. 1929), p. 338; Hunter, *"Outlines of Public Finance"* (1926), p. 162; Brown, *"The Economics of Taxation"* (1924), pp. 202 *et seq.*

[84] *United States* v. *Butler*, 297 U. S. 1, 77.

APPENDIX

APPENDIX

Revenue Act of 1936, Title VII—Refunds of Amounts Collected under the Agricultural Adjustment Act.

SEC. 901. *Repeals:*

Sections 21(d), 21(e) and 21(g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. *Conditions on Allowance of Refunds:*

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustments Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such buden in any manner whatsoever.

SEC. 903. *Filing of Claims:*

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. *Statute of Limitations:*

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, setoff, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this Title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. *Jurisdiction of Courts:*

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. *Procedure on Claims for Refunds of Processing Taxes:*

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employes of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division

thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury Department as may be necessary to perform its functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an officer or

employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented by counsel, to have witnesses subpœnaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpœna, signed by any member of the Board, the attendance and testimony of witnesses and the production of all necessary returns, books, papers, records, correspondence, memoranda, and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a

division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the Unted States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which

such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. *Evidence and Presumption:*

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such months shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such months, and the resulting figure shall be the margin for the month.

(2) *Period Before and After the Tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of

units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of Commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity

of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for

which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any ven-

dee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

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SEC. 910. *Liability of Collectors:*

No collector of internal revenue or customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government.

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SEC. 913. *Definitions:*

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax:

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(c) The term "commodity" means any commodity, prior to processing, of a type with respect to the processing of which a processing tax was imposed under the Agricultural Adjustment Act.

(d) The term "article" means the product which is obtained by processing a commodity, and includes the product obtained by further manufacture or by combination with other materials.

(e) The term "refund" includes any recovery, recoupment, set-off, credit, or counterclaim.

(f) The term "Agricultural Adjustment Act" means the Agricultural Adjustment Act as originally enacted and the amendments thereto adopted prior to January 6, 1936.

Revenue Act of 1936, Title III—Tax on Unjust Enrichment.

SEC. 501. *Tax on Net Income from Certain Sources:*

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to

which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally collected with respect to any articles, to the extent that such net income does not exceed the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

(b) The net income (specified in subsection (a) (1)) from the sale of articles with respect to which the Federal excise tax was not paid, and the net income specified in subsection (a) (2) or (3), shall not include the net income from the sale of any article, from reimbursement with respect to any article, or from refund or credit of Federal excise tax with respect to any article (1) if such article (or the articles processed therefrom) were not sold by the taxpayer on or before the date of the termination of the Federal excise tax; (2) if the taxpayer made a tax adjustment with respect to such article (or the articles processed therefrom) with his vendee; or (3) if under the terms of any statute the taxpayer would have been entitled to a refund from the United States of the Federal excise tax with respect to the article otherwise than as an erroneous or illegal collection (assuming, in case the tax was not paid, that it had been paid).

(c) The net income from the sales specified in subsection (a) (1) shall be computed as follows:

(1) From the gross income from such sales there shall be deducted the allocable portion of the deductions from gross income for the taxable year which are allowable under the applicable Revenue Act; or

(2) If the taxpayer so elects by filing his return on such basis the total net income for the taxable year from the sale of all articles with respect to which each Federal excise tax was imposed (computed by deducting from the gross income from such sales the allocable portion of the deductions from gross income which are allowable under the applicable Revenue Act, but without deduction of the amount of such Federal excise tax which was paid or of the amount of reimbursement to purchasers with respect to such Federal excise tax) shall be divided by the total quantity of such articles sold during the taxable year and the quotient shall be multiplied by the quantity of such articles involved in the sales specified in subsection (a)(1). Such quantities shall be expressed in terms of the unit on the basis of which the Federal excise tax was imposed.

For the purposes of this section the proper apportionment and allocation of deductions with respect to gross income shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(d) The net income from reimbursement or refunds specified in subsection (a) (2) or (3) shall be computed as follows: From the total payment or accrual (1) of reimbursement to the taxpayer from vendors for amounts representing Federal excise tax burdens included in prices paid by the taxpayer to such vendors or (2) of refunds or credits to the taxpayer of Federal excise taxes erroneously or illegally collected, there shall be deducted the expenses and fees reasonably incurred in obtaining such reimbursement or refunds.

(e) For the purposes of subsection (a) (1), (2), and (3), the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

(1) From the selling price of the articles there shall be deducted the sum of (A) the cost of such articles plus (B) the average margin with respect to the quantity involved; or

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the number of such units represented by the articles with respect to which the computation is being made; but

(3) In no case shall the extent to which the taxpayer shifted to others the burden of the Federal excise tax with respect to the articles be deemed to exceed the amount of such tax with respect to such articles minus (A) the portion of the amount of the Federal excise tax (or of the reimbursement specified in subsection (a) (2)) with respect to the articles which is paid or credited by the taxpayer to any purchasers as specified in subsection (f) (3) and minus (B) the amount of any increase in the tax under section 602 of the Revenue Act of 1932 for which the taxpayer under this section became liable as the result of the nonpayment or refund of the Federal excise tax with respect to the articles.

(f) As used in this section—

(1) The term "margin" means the difference between the selling price of articles and the cost thereof, and the term "average margin" means the average difference between the selling price and the cost of similar articles sold by the taxpayer during his six taxable years preceding the initial imposition of the Federal excise tax in question, except that if during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are

so inadequate as not to furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced.

(2) The term "cost" means, in the case of articles manufactured or produced by the taxpayer, the cost to the taxpayer of materials entering into the articles; or, in the case of articles purchased by the taxpayer for resale, the price paid by him for such articles (reduced in both cases by the amount for which he is reimbursed by his vendor).

(3) The term "selling price" means selling price minus (A) amounts subsequently paid or credited to the purchaser on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936, as reimbursement for the amount included in such price on account of a Federal excise tax; and minus (B) the allocable portion of any professional fees and expenses of litigation incurred in securing the refund or preventing the collection of the Federal excise tax, not to exceed 10 per centum of the amount of such tax.

(g) In determining costs, selling prices, and net income, the taxpayer shall, unless otherwise shown, be deemed to have sold articles in the order in which they were manufactured, produced, or acquired. Where the taxpayer's records do not adequately establish the quantity of a commodity taxable under the Agricultural Adjustment Act, as amended, entering into articles sold by him, such quantities shall be computed by the use of the conversion factors prescribed in regulations under such Act, as amended.

(h) If the taxpayer made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. Such proof may include, but shall not be limited to:

(1) Proof that the change or lack of change in the margin was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type of grade of article or materials, or (B) in costs of production. If the taxpayer asserts that the burden of the tax was borne by him while the burden of any other increased cost was shifted to others, the Commissioner shall determine, from the respective effective dates of the tax and of the other increase in cost as compared with the date of the change in margin, and from the general experience of the industry, whether the tax or the increase in other cost was shifted to others. If the Commissioner determines that the change in margin was due in part to the tax and in part to the increase in other cost, he shall apportion the change in margin between them.

(2) Proof that the taxpayer modified contracts of sale, or adopted a new contract of sale, to reflect the initiation, termination, or change in amount of the Federal excise tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the taxpayer may establish that such acts were caused by factors other than the tax, or that they do not represent his practice during the period in which the articles in question were sold.

(j) As used in this section—

(1) The term "Federal excise tax" means a tax or exaction with respect to the sale, lease, manufacture, production, processing, ginning, importation, transportation, refining, recovery, or holding for sale or other disposition, of commodities or articles, provided for by any Federal statute, whether valid or invalid, if denominated a "tax" by such statute. A Federal excise tax shall be deemed to have been imposed with respect to an article if it was imposed with respect to (or with respect to the processing of) any commodity or other article, from which such article was processed.

(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

(3) The term "refund or credit" does not include a refund or credit made in accordance with the provisions and limitations set forth in Title VII of this Act, or in section 621 (d) of the Revenue Act of 1932.

(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in connection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936.

(5) The term "taxpayer" means a person subject to a tax imposed by this section.

(k) All references in this section to the purchase or sale (or to parties to the sale) of articles with respect to which a Federal excise tax was imposed shall be deemed to include the purchase or sale (or parties to the sale) of services with respect to which a Federal excise tax was imposed, and for the purposes of subsection (a) the extent to which the tax-

payer shifted to others the burden of such Federal excise tax with respect to such services shall be presumed to be an amount computed as follows: From the selling price of the services there shall be deducted the average price received by the taxpayer for performing similar services during the six taxable years preceding the initial imposition of the Federal excise tax in question. The balance (to the extent that it does not exceed the amount of such Federal excise tax with respect to such services minus any payments or credits with respect to the services made to purchasers as specified in subsection (f) (3)) shall be the extent to which the taxpayer shifted the burden of such Federal excise tax to others. If during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to furnish satisfactory data, the average price of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average price, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced. The presumption established by this subsection may be rebutted by proof of the character described in subsection (i).

(l) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's entire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

• • • • • •

Section 21 (d) (1) of the AAA as Amended by Act of August 24, 1935.

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

Revenue Act of 1928, Section 424—Refund of Automobile Accessories Tax.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

United States Revised Statutes.

Sec. 3220. [As amended by Sec. 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Sec. 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791.] Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section (U. S. C., Title 26, Sec. 1670).

Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court (U. S. C., Title 26, Sec. 1543).

Sec. 3226. [As amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169.] No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the

regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates (U. S. C., Title 26, Secs. 1672-1673).

Sec. 3228. [As amended by Sec. 1112 of the Revenue Act of 1926, Sec. 619 of the Revenue Act of 1928, and Sec. 1106 of the Revenue Act of 1932.] (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund. * * * (U. S. C., Title 26, Sec. 1433.)

Regulations 47.

(Revised August 1, 1924)
Relating to

THE EXCISE TAXES
On Sales By the Manufacturer
Under
Section 600 of the Revenue Act of 1924

• • • • • •

Art. 3. *Basis of tax.*—The tax is imposed on the sale by the manufacturer and should be returned and paid by him whether the sales price is actually collected or not. It is measured by the price for which the article is sold by the manufacturer and not by the list price where that differs from the actual sales price. If the price of a taxable article is increased to cover the tax, and the article is sold at such price, including the tax, the tax is on such increased price.

The manufacturer may reimburse himself in the amount of the tax by agreement with the purchaser in the following manner: (a) By quoting the selling price and the tax in separate and exact amounts, and where invoices are rendered, by segregating these amounts on the invoices as outlined in examples (1) and (5) below; or (b) by stating to the purchaser in advance of the sale what portion of the quoted charge represents the price charged for the article and what portion represents tax, and where invoices are rendered by invoicing in the manner outlined in example (2) below, in which case the amount of the tax need not be included in computing the tax.

Where goods are ordered direct from the manufacturer with no agreement as to price, the tax is based on the amount billed or invoiced to the purchaser as the selling price. Mere statements or agreements that the quoted or contract price includes the tax do not operate to exclude any part thereof from tax, unless the price is billed in the manner outlined in example (1), (2), or (5) below.

Where a lump sum is specified as the price of a taxable article or articles, and other articles not taxable and not a component part of the taxable articles are included in the price, the tax attaches to the entire amount unless the selling prices of the taxable and nontaxable articles are segregated. In such case the tax will be measured by the price specified as the selling price of the taxable article or articles (examples 3 and 4). *The following examples illustrate the method by which the manufacturer may separate the tax from the selling price in invoicing goods to the purchaser.*

Example (1). A, the manufacturer, quotes a selling price to B of $100 and bills the goods to B as:

"Article No. 1, selling price, $100; tax $5."

Example (2). A, the manufacturer, quotes a charge of $105, stating that 20/21 of the charge represents the price and 1/21 represents the tax, billing the goods to B as:

"Article No. 1, charge $105, 20/21 of the total represents price, and 1/21 represents tax."

The tax in examples (1) and (2) is computed on $100, the quoted and actual selling price.

It should be noted that the above examples apply to articles taxable at 5 per cent. The same general principles apply where other rates obtain, though the fractions as used in example (2) would vary.

Example (3). A, the manufacturer, quotes a selling price or contracts to sell goods at $105, including tax, and bills the goods to B as:

"Article No. 1, selling price, including tax, $105."

The tax is computed on $105, the quoted and invoiced selling price.

Example (4). A manufacturer sells an automobile to B, including insurance, gas, and oil, and bills it as:

"One car, 2,150."

The tax is based on the full amount of $2,150.

Example (5). If in example (4) the invoice separates the charges into items, as "chassis $1,500, body $500, gas and oil $20, insurance $30, tax $100," the tax is based on $2,000, the selling price of the chassis and body as specified.

The underlying principle involved in examples (1) and (2) is that the price constitutes the basis for computing the tax and must be specified. *As the price itself forms the basis for computing the tax, it is just as important that this item be mentioned as that the tax be specified.* A manufacturer does not properly compute a 5 per cent tax on a sale at a price of $105 by taking 1/21 of that sum, even though he might say that the price was $105 and that 1/21 was tax. If $105 is designated as the price of an article, even though it be stated that such price includes the tax, the tax nevertheless applies to such entire price, and the fact that some part of it may be used to pay taxes affords no ground for concluding that the remaining portion, that is, the net proceeds of the sale after tax is paid, should form the basis for computing taxes. In case the manufacturer sells tires subject to 2½ per cent tax, and desires to collect the tax in addition to the price, charging $40 as the price of the tires and $1 as tax, the terms of sale should show specifically that $40 is the price and $1 is tax, or he can indicate that $41 will be a charge made up of two items, 40/41 of the charge being the price and 1/41 being the tax; price lists, billings, invoices, etc., being made out accordingly. *In other words, both price and tax must be designated and specified.* (Italics supplied.)

* * * * * *

TREASURY DEPARTMENT

Washington.

September 25, 1934.

File No. M-T-PT:C

Mr. W. Ray Bell,
The Association of Cotton Textile Merchants
of New York,
40 Worth Street,
New York City, New York.

Sir:

Reference is made to your letter of August 31, 1934, in which you advise this office that certain states, particularly the State of New Jersey, have deducted from their remittances covering invoices for cotton fabrics and other cotton articles the amount of the enhancement of the price incident to the processing tax imposed under the Agricultural Adjustment Act. You state that you cannot legally sue the state and request to be advised what steps you should take in order to meet the situation. You suggest the possibility that the regulations of this Department could be amended so as to provide for refund of taxes paid with respect to articles delivered to any sovereign state.

In reply you are advised that Article 9 (2) (b) of Regulation 81 provides in part that processing for, or for the sale to the United States, a state, a territory, or a possession is subject to the tax, whether or not the commodity or the product derived from the commodity is owned by the United States, such state, such territory, or such possession.

The processing tax attaches upon the first domestic processing of cotton and is payable by the processor. *The amount paid as tax with respect to such commodity increases the cost of conducting his business and becomes an indivisible part of the production cost, similar to the man-*

ner in which other expenses such as depreciation, interest on capital invested, and taxes paid to the state, are incident to the conduct of a manufacturing business and enhance the cost of articles produced. The processing tax cannot be considered as a tax with respect to any person other than the person liable to the government for the tax.

The addition to the net sale price of an article sold to the State of New Jersey, of an amount equal to the processing tax paid with respect to such article cannot properly be said to be an addition of the processing tax to such price, but is a procedure resorted to by the vendor to designate the proportionate amount of the gross sales price which was expended as a production cost incident to the processing tax and to explain the resulting increment in such gross sales price.

There are no provisions in the law on which to base an amendment to the regulation providing for refund of taxes paid with respect to articles delivered to a sovereign state, except where the articles are delivered for charitable distribution, or use, or for the use of an organization engaged in welfare work. Therefore, the matter does not come within the jurisdiction of this Bureau, but is a matter to be adjusted between the parties concerned. (Italics supplied.)

Respectfully,

(Signed) D. S. Bliss,
Deputy Commissioner.

FILE COPY

No. 67

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122456—37

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY, A CORPORATION, PETITIONER

v.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 51–53) is reported in 15 F. Supp. 257. The opinion of the Circuit Court of Appeals (R. 66–78) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered January 8, 1937 (R. 79). The petition for writ of certiorari was filed January 21, 1937. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The applicable provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, and the Revised Statutes are printed in the Appendix to the petitioner's brief (pp. 25–38), and are not reprinted herein.

QUESTION PRESENTED

Whether the District Court had jurisdiction to entertain this suit for the recovery of taxes paid under the Agricultural Adjustment Act notwithstanding the provisions of Title VII of the Revenue Act of 1936.

STATEMENT

This action was brought in the United States District Court for the Northern District of Alabama, for recovery of amounts paid as taxes under the provisions of the Agricultural Adjustment Act, c. 25, 48 Stat. 31. The complaint, originally filed November 22, 1935 (R. 1–19), was subsequently amended, on June 12, 1936 (R. 24–34) and on July 3, 1936 (R. 38–42).

The complaint as amended alleges that the taxpayer, an Alabama corporation, paid to the respondent, as Collector of Internal Revenue, processing and floor stock taxes imposed under the Agricultural Adjustment Act in the respective amounts of $257,935.77 and $11,918.28 (R. 1–3, 11–12), for which claims for refund were filed on

June 12, 1935, and rejected by the Commissioner of Internal Revenue on August 16, 1935 (R. 5, 14). Recovery is sought on the sole ground that the Agricultural Adjustment Act, under which these amounts were collected, was unconstitutional.

The Collector moved to dismiss the complaint as amended on the ground that the court was without jurisdiction to entertain the suit, and on the further ground that the complaint failed to state a cause of action against the Collector (R. 19–24, 35–37). The motion to dismiss was overruled by the District Court on the ground that the same question could be reached by demurrer (R. 45, 52). The Collector then demurred to the complaint on the same ground (R. 42–44). Following the enactment of the Revenue Act of 1936, c. 690, 49 Stat. 1648, the Collector's demurrer was amended (R. 46–50). The amended demurrer was based upon the ground that the court was without jurisdiction of the action because of certain provisions contained in Title VII of the 1936 Act, and on the further ground that the complaint failed to state a cause of action against the Collector. The District Court sustained the demurrer on the latter ground and entered judgment for the Collector. On appeal, the Circuit Court of Appeals affirmed the judgment of the District Court upon the ground that there was no jurisdiction in the District Court to entertain the suit (R. 78).

ARGUMENT

The question presented in this case is substantially the same as that presented by the petitions in *Continental Mills* v. *United States*, No. 572, October Term, 1936, certiorari denied, January 4, 1937, and *Barlow-Moore Tobacco Co.* v. *United States of America*, No. 576, October Term, 1936, certiorari denied, February 1, 1937. As indicated by the Government's memorandum in the *Continental Mills* case, the question is important and the decisions of the District Courts are in conflict.[1]

The only difference between this case and the cases of *Continental Mills, supra,* and *Barlow-Moore Tobacco Co., supra,* lies in the fact that the present action was brought against the Col-

[1] In addition to this case, the provisions of the Revenue Act of 1936 here involved have been held to deprive the courts of jurisdiction in *Continental Mills* v. *United States*, 17 F. Supp. 138 (C. Cls.), certiorari denied, January 4, 1937; *Butler* v. *Carney*, 17 F. Supp. 133 (Mass.); *Edwin Cigar Co., Inc.* v. *Higgins* (S. D. N. Y.), decided December 18, 1936, not yet officially reported but found in 1937 CCH, Vol. 3, ¶9013; *Wilkes-Barre Lace Mfg. Co.* v. *Mundy* (M. D. Pa.), decided January 28, 1937, but not yet reported. The same provisions have been held unconstitutional in *Priddy & Co., Inc.* v. *Early, Jr.* (E. D. Va.), decided October 29, 1936, not officially reported but found in 1936 CCH, Vol. 4, ¶9495, now pending before the Circuit Court of Appeals for the Fourth Circuit; *Cudahy Bros. Co.* v. *LaBudde* (E. D. Wis.), decided December 28, 1936; *Marshall Field & Co., Inc.* v. *United States* (Customs Court), decided December 16, 1936, not officially reported but found in 1937 CCH, Vol. 3, ¶9019, petition for rehearing pending.

lector of Internal Revenue to whom the taxes were paid, rather than against the United States. The Government's position on this point, however, is that the action against a Collector of Internal Revenue for the recovery of taxes erroneously or illegally collected is purely statutory and the power of Congress to change or modify that remedy is governed by the same considerations which govern the power of Congress to change or modify a remedy against the United States itself. This position was sustained by the court below and is fully supported by the decisions of this Court. *Cary* v. *Curtis*, 3 How. 236; *Collector* v. *Hubbard*, 12 Wall. 1; *Curtis's Adm.* v. *Fiedler*, 2 Black 461; *Barney* v. *Watson*, 92 U. S. 449; *Arnson* v. *Murphy*, 109 U. S. 238; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373. Section 910 of the Revenue Act of 1936 removing the statutory liability of Collectors of Internal Revenue is no broader than Section 25 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, 141, withdrawing the right to sue Collectors of Customs. The latter provision has been sustained by this Court. *Schoenfeld* v. *Hendricks*, 152 U. S. 691. Cf. *United States* v. *Passavant*, 169 U. S. 16. The substitute remedy provided by Section 906 of the Revenue Act of 1936 satisfies the requirement of due process of law. Cf. *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716; *Phillips* v. *Commissioner*, 283 U. S. 589. However, this matter would

seem immaterial to the question of jurisdiction here presented.

The decision of the court below seems to be plainly correct and the petition presents no consideration in addition to the matters presented in *Continental Mills* v. *United States* and *Barlow-Moore Tobacco Co.* v. *United States of America*, *supra*.

CONCLUSION

The decision of the court below was correct and it would seem that the considerations which led to the denial of the petition for certiorari in *Continental Mills* v. *United States*, *supra*, and *Barlow-Moore Tobacco Co.* v. *United States of America*, *supra*, would be applicable here, and that the present petition accordingly should be denied.

Respectfully submitted.

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FEBRUARY 1937.

U. S. GOVERNMENT PRINTING OFFICE 1937

FILE COPY

No. 667

In the Supreme Court of the United States

OCTOBER TERM, 1936

ANNISTON MANUFACTURING COMPANY, A CORPORATION, PETITIONER

v.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY, A CORPORATION, PETITIONER

v.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 37–39) is reported in 15 F. Supp. 257. The opinion of the Circuit Court of Appeals (R. 47–59) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered January 8, 1937 (R. 60). The petition for a writ of certiorari was filed January 21, 1937, and was granted February

15, 1937. (R. 6.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court could entertain this suit for the recovery of floor stocks taxes and processing taxes paid under the Agricultural Adjustment Act, notwithstanding the provisions of Title VII of the Revenue Act of 1936.

STATUTES INVOLVED

The applicable provisions of the statutes involved will be found in Appendix A, *infra,* pp. 165–187.

STATEMENT

This action was brought in the United States District Court for the Northern District of Alabama for recovery of amounts paid as floor stocks taxes and processing taxes under the provisions of Sections 9 and 16 of the Agricultural Adjustment Act (*infra,* p. 185). The complaint, originally filed November 22, 1935 (R. 1–15), was subsequently amended on June 12, 1936 (R. 18–26), and on July 3, 1936 (R. 29–32).

The complaint alleged that the taxpayer, an Alabama corporation, paid to the respondent, as Collector of Internal Revenue, processing and floor stocks taxes imposed under the Agricultural Adjustment Act in the respective amounts of $257,935.77 and $11,918.28 (R. 1–2, 8–9), for which claims for refund were filed on June 12, 1935, and

rejected by the Commissioner of Internal Revenue on August 16, 1935 (R. 4, 11). Recovery is sought on the sole ground that the Agricultural Adjustment Act under which these amounts were collected was unconstitutional.

The Collector moved to dismiss the complaint on the ground that the court was without jurisdiction to entertain the suit, and on the further ground that the complaint failed to state a cause of action against the Collector under Section 21 (d) of the Agricultural Adjustment Act, as amended (R. 15–18, 27–28). The motion to dismiss, as amended, was overruled by the District Court on the ground that the same question could be reached by a demurrer (R. 33–34, 38–39). The Collector then demurred to the complaint on the grounds originally asserted in the amended motion to dismiss (R. 32–33). Following the enactment of Title VII of the Revenue Act of 1936 (Appendix A, *infra*), the Collector's demurrer was amended (R. 34–37). The amended demurrer alleged that the court was without jurisdiction of the action because of certain provisions of Title VII of the 1936 Act, and on the further ground that the complaint, because of the provisions of that title, failed to state a cause of action against the Collector. The District Court sustained the demurrer on the latter ground and entered judgment for the Collector (R. 38–40). On appeal the Circuit Court of Appeals affirmed the judgment of the District Court, holding that there was no juris-

diction in the District Court to entertain this suit (R. 78, 79). The petitioner thereupon filed a petition for a writ of certiorari which was granted by this court.

SUMMARY OF ARGUMENT

I

Sections 906 (a), 904, and 910 unequivocally prohibit the maintenance of this suit. It is unnecessary to consider the adequacy of the substitute remedies which have been provided, for long established and unquestioned principles of constitutional law demonstrate that Congress has a complete and unfettered power to give, withhold, or take away the jurisdiction of the inferior Federal courts. *Sheldon* v. *Sill,* 8 How. 441, 448; *Aetna Life Insurance Co.* v. *Haworth,* No. 446, October Term, 1936. This power is in no sense limited by the fact that it may be exercised to remove jurisdiction over suits which were pending, or capable of being brought, at the date of enactment. *Smallwood* v. *Gallardo,* 275 U. S. 56, 62; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234.

Since petitioner does not question these settled principles, it seems that the disposition of this case must be made on this ground alone. The only theory by which a further inquiry is relevant is that which assumes that, if other provisions of Title VII are not valid, the jurisdictional provisions are inseparable and must also fall. This theory, however, ignores the fact that Congress would ap-

parently have preferred to leave Agricultural Adjustment Act taxpayers without any remedy rather than to provide for refund upon mere proof of payment. Moreover, it is wholly inadequate to explain how jurisdiction may be exercised merely because a prohibition of the jurisdiction is held to be inoperative. The Federal courts must have an unrepealed statute authorizing the exercise of judicial power; even if the jurisdictional provisions should fall, there would be in existence no statute authorizing the maintenance of these suits.

II

It is plain, and no contention is made to the contrary, that Title VII prevents petitioner from stating a cause of action against the Collector. It can, therefore, secure reversal only if Section 902 (and Section 903) and Section 910 are each held unconstitutional. While it is unnecessary in this case to decide whether the Collector shares the sovereign immunity to suit, it should be noted that the decision below cannot be reversed without a holding that this immunity does not extend to the Collector.

III

1. Petitioner has not, and cannot, state a common law action against the Collector on the theory of money had and received. The settled rule that the agent of a known principal cannot be held per-

sonally liable if, pursuant to his duty, he has paid the money over to his principal, is fully applicable to the revenue collector. *Cary* v. *Curtis*, 3 How. 236; *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 478. Consequently, it is established that the revenue collector is sued, not in the common law action of assumpsit, but under a purely statutory remedy. *The Collector* v. *Hubbard*, 12 Wall. 1, 12, 14; *Arnson* v. *Murphy*, 109 U. S. 238, 240, 243; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

The cases, such as *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, in which this action has been said to be personal are in no manner inconsistent with this settled rule. If Congress chooses to extend a remedy in the form of a personal action, it must be taken to have intended that the ordinary procedural incidents of such an action would apply.

2. No added virtue is lent to petitioner's complaint because the Collector was acting under a statute later held unconstitutional. Petitioner's argument is based solely upon the fiction that an unconstitutional statute was never enacted, and that the Collector, therefore, was acting in the complete absence of authority. It ignores the reason for the rule of personal liability, the purpose of which is to protect the citizen from arbitrary action from an especially dangerous source. *Ashby* v. *White*, 22 Ld. Raym. 938, 956. Action under a statute later declared to be unconstitutional presents no danger of this character.

The decisions of this Court make it clear that it has rejected any such unflinching application of the theory that an invalid statute is void *ab initio*. It has indicated that the Collector would be a trespasser only after final decision of invalidity. *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113. It does not allow the public official a standing to attack the constitutionality of a statute which he is under a duty to enforce. It does not view mere allegations of unconstitutionality, admitted on demurrer, to convert the tax collector into a trespasser, who may be restrained by equity. There is no reason why the established immunity of the Collector who, in good faith, collects under a merely illegal assessment should not be extended to the Collector who acts under an assessment based upon an unconstitutional statute.

If there were any doubt on the question, the threat to orderly administration of the Government which would be represented in a decision of personal liability must compel another decision. Of ministerial officers "the law exacts unhesitating obedience to its process." *Harding* v. *Woodcock*, 137 U. S. 43, 48. Subordinate officials must devote their efforts to the enforcement of the laws and not to the subtle dialectics of constitutional law.

IV

Petitioner argues with some vehemence that it has a vested right in the recovery of the taxes to which it was entitled at the time this cause of

action arose. We are not certain of the precise import of this contention.

1. If petitioner means that he has a vested right in the recovery guaranteed by the Constitution, we have no quarrel with its argument. But the Constitution does not protect petitioner's claim for full recovery of the taxes. Its protection extends no farther than to insure that it may recover the taxes whose economic burden it has borne. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. This right remains to the petitioner under Title VII, the sole effect of which in this respect is to withdraw one of the alternative remedies, suit against the United States or suit against the Collector, and leaves the other unimpaired.

2. If, however, petitioner's position should be that it has a vested right in the continuation of the remedies existing when its cause of action accrued, even though it would recover under them more than the Constitution would otherwise protect, we submit that its argument flies in the face of established law.

None can assert a vested right in any mode of procedure or in any particular remedy. *Richmond Mortgage Corp.* v. *Wachovia Bank*, No. 235, October Term, 1936. The fact that a nominal party defendant can no longer be sued operates in no manner to limit the power of Congress to substitute a new remedy for the recovery of taxes. *Burrill* v. *Locomobile Co.*, 258 U. S. 34. Even were petitioner's asserted cause of action one which is based

on the common law, there is no magic which places a common law action beyond the power of the legislature to control or abolish. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Crowell* v. *Benson*, 285 U. S. 22.

It follows *a fortiori* that the Congress has power to substitute a new remedy with respect to controversies between the Government and its taxpayers. *The Collector* v. *Hubbard*, 12 Wall. 1, 14; *Ex parte Bakelite Corp.*, 279 U. S. 438, 451. Especially is this the case since the suit for a refund of taxes is in substance and reality merely a remedy against the United States, even though the Collector be the nominal party defendant. *Philadelphia* v. *The Collector*, 5 Wall. 720, 735; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

V

1. The Agricultural Adjustment Act was in force for more than two and a half years. Under its authority relatively heavy taxes were collected on the basic commodities of the nation's economy. It was inevitable that economic readjustments should be made in the light of these taxes. Economists are agreed that such taxes, applicable indifferently to every competitor, ordinarily tend to be shifted to another than the nominal taxpayer.

Congress recognized this principle in the enactment of the Agricultural Adjustment Act, and plainly expected that the burden of the tax would be shifted to the consumer. Its subsequent history demonstrates that the cotton industry, as well as

other processing industries, in general, shifted the burden of this tax to the consumer.

Accordingly, Congress was faced by a problem of great difficulty with respect to the $963,000,000 collected in taxes before this Court declared the Act to be unconstitutional. There seem to have been only four alternatives.

Congress could have refunded the taxes upon mere proof of their payment. Since the typical processor was not in fact injured by the imposition of this tax, such a refund would be a gratuity of unprecedented size. Alternatively, Congress could have adopted the rough generalization that the consumer had in every case borne the burden of the tax. However, it is plainly impossible, as a practical matter, to determine either the particular consumer or the amount of the tax burden which he bore.

In the third place, Congress could have refused to make any refund of the taxes. Since the general taxpayers as a class are roughly equivalent to the consumers as a class, this provision would come relatively close to a just solution. The legislative history of Section 21 (d) of the Agricultural Adjustment Act indicates that Congress would have preferred this solution to an automatic refund upon mere proof of payment.

However, it was recognized that an occasional processor was in fact injured through the imposition of this tax. A government solicitous to avoid injustice to such a taxpayer would provide for refund to him and, if it were equally anxious not to

penalize its taxpayers for the benefit of the processors who were not injured by the tax, it would at the same time provide that no refund should be made to those taxpayers who did not bear the burden of the tax. This alternative was the one which Congress adopted in forming the Revenue Act of 1936. We submit that it is the fairest remedy which Congress could have applied to a situation of great difficulty.

2. Preliminary to discussing the particular objections raised to the provisions of Title VII, it is necessary to examine which of the questions raised by the petitioner may be considered in the case at bar. We agree that this Court, if it considers the constitutionality of these provisions to be relevant to the disposition of this case, may properly pass upon those questions which appear on the face of the Act. These embrace: (1) The procedure set up in Section 906 by which an administrative tribunal is provided to review the Commissioner's disallowance of processing tax refund claims; and (2) the constitutionality of Section 902, which provides in substance that the Agricultural Adjustment Act taxpayer can obtain a refund of the taxes to the extent that he shows that he bore the burden of their imposition.

However, we emphatically challenge petitioner's belief that this Court at this time can consider the objections which he raises to Section 907. These questions all relate to the manner in which the actual proof of the tax incidence will be made or

to the possibility of making adequate proof of this fact. In the absence of the facts of an actual case, the inquiry must be purely speculative and abstract. This Court has frequently declined to make constitutional decisions upon such questions when the facts are purely a matter of speculation. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Boston & Maine R. Co.* v. *Armburg,* 285 U. S. 234. 234.

VI

Petitioner attacks the administrative remedy provided for the recovery of processing taxes as unconstitutional. The Commissioner's disallowance of the claim is to be reviewed, under Section 906, by an administrative tribunal set up in the Treasury Department. Its decisions are subject to review on questions of law by the Circuit Courts of Appeals, and further review may be had in this Court on writ of certiorari. The procedure is analogous to that obtaining in the Board of Tax Appeals, and we do not see that there can be any serious question as to its constitutionality.

Petitioner attacks it only on two grounds. He objects that the members of the Board are taken from the Treasury Department. But in this manner Congress was able to secure administrative experts trained in the field of taxation. The members of the Board will not, of course, have any duties in connection with the Commissioner's examination of refund claims. The whole history of administrative law is founded on a tradition which

combines investigatory and quasi-judicial functions in the same agency.

Petitioner also objects that one officer or member of the Board might hear the evidence and another decide the case without considering the evidence. This contention is contrary to the express provisions of Section 906.

VII

1. Section 902 in substance provides that no refund shall be made of a tax collected under the Agricultural Adjustment Act unless the claimant shows that he bore the burden of this tax. Like Section 21 (d) of the Agricultural Adjustment Act, it was adopted because of the legislative recognition of the principle that a taxpayer is unlawfully enriched if he is allowed a refund of a tax the economic burden of which has been shifted to another.

We do not believe that there can be any constitutional objection to such a limitation in view of the decision in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. That case upheld Section 424 of the Revenue Act of 1928, which limited the refund of the Automobile Accessories Tax to taxpayers who had not "collected, directly or indirectly", the amount of the tax from their vendees. While the *Jefferson Electric* case involved a sales tax rather than a manufacturing tax, we do not see that this distinction in any way affects the principle that a taxpayer can claim no constitutional right to the refund of taxes unless he has in fact borne the economic burden.

This principle is sanctioned by the equitable basis of the action for money had and received. *Myers* v. *Hurley Motor Co.*, 273 U. S. 18, 25. The same principle has often been applied in tax controversies. The fact that the vendees could not recover from the taxpayer in quasi-contract, and the fact that the processor could gain no immunity because of sales to a state instrumentality are immaterial to the *economic* fact of tax shifting.

The argument that whether or not the taxpayer bore the burden of the Agricultural Adjustment Act tax is no concern of the Government, but relates only to the equities between the taxpayer and his vendees, ignores the fact that retention by the Government is the closest possible approximation of their refund to the consumer. In any event, the equitable defense of unjust enrichment is directed at the weakness of the plaintiff's claim, and the rights of the consumers are objections which the processor "cannot be heard to make." *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 484. See also *Perry* v. *United States*, 294 U. S. 330.

Since Congress had power to impose this limitation upon the right of recovery of taxes illegally collected, long sanctioned practice permits it to place the burden of proof upon the taxpayer in common with the other elements of his claim.

2. Whether or not Section 907 provides a fair and practicable method of proving whether or not the processor shifted the burden of the tax cannot

adequately be answered in this case. But if this Court feels that it should consider the speculative attacks made by petitioner, we submit that the section must be sustained on every count.

The basic premise of Section 907 is that any unexplained decline in earnings during the period of the tax will indicate that the processor bore the burden of the tax, while constant or increased earnings will indicate that the burden was shifted to others. Accordingly, the statute contemplates a comparison of earnings during the tax period with those during a representative period before and after the tax. In the interests of a preliminary simplification, a decrease in the gross processing margin is made *prima facie* evidence that the claimant bore the burden of the tax, while an unchanged or increased margin indicates that the tax burden had been shifted. However, it is recognized that changes in the gross processing margin might involve factors other than the tax. Accordingly the *prima facie* results may be refuted by the process of rebutting the assumption that no other factor entering into the processing margin had changed during the tax period. In result, either the Commissioner or the taxpayer has power to take into account all factors which enter into the earnings of the processor, and any remaining variation must be due to the only new factor, the processing tax.

Petitioner urges that the section imposes an impossible burden of proof because it requires that

the claimant establish the prices which would have prevailed had the processing tax not been in effect. But it makes no such requirement, and permits a refund on the basis of a comparison of the processing margins with adjustment for changes in factors other than the tax. While an ideal system might seek also to include the effect of the tax itself on market forces, Section 907 was pre-designed for a world of reality, not of abstractions. See *Weiss* v. *Wiener*, 279 U. S. 333, 335; *Helvering* v. *Midland Mutual Life Insurance Co.*, No. 257, October Term, 1936. Petitioner does not argue that it is impossible to prove the processing margins themselves or the changes in other costs of processing which may be used to refine the margin results.

The presumption established by 907 (a) is plainly capable of rebuttal, and is therefore not invalid because conclusive. It can, therefore, be held unconstitutional only if the result presumed has no rational connection with the facts which raise the inference. Petitioner's argument, at most, merely shows that the presumption gives rough rather than precise results; we do not see how this admitted inaccuracy, which may subsequently be removed under Section 907 (e), can be stretched into an absence of rational connection. Indeed, the margin analysis is customarily used in the textile industry itself.

Petitioner urges that Sections 902 and 907 are unconstitutional because of their failure to allow for the consequential losses suffered by processors

because of the imposition of the processing tax. However, production in the textile industry actually increased after imposition of the tax, and we do not see that petitioner is in a position to complain. While the increase in sales would probably have been larger had there been no tax, it seems equally plain that the benefit payments of the Agricultural Adjustment Act contributed to an increase in the sale of cotton textiles, which would not have obtained had it not been for the tax. We see nothing unfair, much less unconstitutional, in failing to provide for consideration of these compensatory and wholly incalculable and remote factors.

The period with which comparison is made in order to determine whether or not the processing tax affected earnings is the two years prior to the imposition of the tax and the six months, February to July 1936. Petitioner's attack upon this period as unfair ignores the last six months and the fact that a better comparison is had if periods relatively close in point of time are examined. This is especially the case in the cotton industry where there has been a pronounced and steady decline in the processing margin during the decade preceding the tax.

Section 907 thus provides a fair and practicable method of determining whether or not the burden of the tax was borne by the processor. If it does not embody perfect economic theory, and if in actual practice it should not produce a perfect precision of analysis, these are defects common to all taxing statutes. The Constitution does not de-

mand an impossible perfection. *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 190, 191.

ARGUMENT

I

CONGRESS DEPRIVED THE DISTRICT COURT OF JURISDICTION OF THIS SUIT IN EXERCISE OF ITS PLENARY POWER OVER THE JURISDICTION OF INFERIOR FEDERAL COURTS

This is a suit against the Collector of Internal Revenue to recover floor stocks taxes and processing taxes imposed by the Agricultural Adjustment Act. When it was begun in November 1935, the District Court had jurisdiction of such a suit subject to the limitations of Section 21 (d), (e), and (g) of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935 (c. 641, 49 Stat. 750, 770, Sec. 30). But before the case was disposed of by the District Court, Title VII of the Revenue Act of 1936 was enacted (c. 690, 49 Stat. 1648), which repealed Section 21 (d), (e), and (g) of the Agricultural Adjustment Act, as amended, and substituted new remedies for the recovery of floor stocks taxes and processing taxes in lieu of the remedies theretofore existing.

We do not believe that there can be any serious question but that Title VII forbids the maintenance of this suit and deprives the District Court of its jurisdiction.

First. In so far as this suit seeks recovery of processing taxes, as distinguished from floor stocks

taxes, Section 906 (a) *infra,* p. 168) provides that "no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court" for the recovery of such taxes. In place of such a remedy, Section 906 (b) establishes a Board of Review in the Treasury Department to which is given, subject to judicial review, the exclusive jurisdiction to review the action of the Commissioner of Internal Revenue in disallowing in whole or in part any claim for the refund of processing taxes.

Second. In so far as this suit seeks recovery of floor stocks taxes, Section 904 (*infra,* p. 167) provides that "no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court" prior to the disallowance by the Commissioner of a claim filed under the provisions of Title VII.[1] The bill does not allege that such a claim was filed, or that it was denied by the Commissioner.

Third. Section 910 (*infra,* p. 178) provides, in substance, that no collector shall be liable for the recovery of any Agricultural Adjustment Act taxes which he collected in the course of his official duties and paid into the Treasury.[2] The bill

[1] Under Section 904 suit may also be brought if the Commissioner renders no decision within 18 months after the claim was filed.

[2] It is not entirely certain whether Section 910 is more properly classified as a limitation upon the jurisdiction or as a redefinition of what constitutes a good cause of action. We have, accordingly, treated it under both heads. See *infra,* p. [illegible]33

does not allege that the respondent collected any of the taxes other than in the course of his official duties, or that they were not paid into the Treasury.

There can be no question but that this suit falls within the terms of these sections. Petitioner does not argue to the contrary.[3] The court below held that Title VII deprived the District Court of jurisdiction (R. 59), and no court that has yet passed upon the question has expressed any doubt that Sections 904, 906 (a), and 910 operated, if valid, to deprive the courts of jurisdiction. *Continental Mills* v. *United States,* 17 F. Supp. 138 (C. Cls.), certiorari denied, No. 572, October Term, 1936; *Butler* v. *Carney,* 17 F. Supp. 133 (D. Mass.); *Sheridan Flouring Mills* v. *Cassidy* (D. Wyo.), 17 F. Supp. 598; *Cudahy Packing Co.* v. *Harrison* (N. D. Ill.), decided February 9, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9450; *Wilkes-Barre Lace Mfg. Co.* v. *Mundy* (M. D. Pa.), decided January 28, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9405; *Cudahy Bros. Co.* v. *LaBudde* (E. D. Wis.), decided December 28, 1936, not yet reported;

[3] While not denying that these sections, if valid, prevent maintenance of this suit, petitioner does state (Br. 74) "There is certainly no basis for suggesting that Congress has attempted in Title VII to exercise its peculiar control over the jurisdiction of inferior Federal courts." Unless petitioner believes there is some especial magic in the particular word "jurisdiction", we cannot understand how it reaches this rather paradoxical conclusion.

Edwin Cigar Co. v. *Higgins* (S. D. N. Y.) decided December 18, 1936, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9224, now pending in the Circuit Court of Appeals for the Second Circuit; *Chas. W. Priddy & Co.* v. *Early* (E. D. Va.), decided October 29, 1936, not yet officially reported but found in 1936 C. C. H., Vol. 4, p. 10,336; *Marshall Field & Co.* v. *United States* (Customs Ct.), decided December 16, 1936, not yet officially reported, but found in 1937 C. C. H., Vol. 3, p. 9240.[4]

Since it is clear that Title VII withdraws the jurisdiction of the District Court to entertain a suit such as this, the only question is whether or not Congress has constitutional power so to curtail the jurisdiction of the District Court.

Before discussing this power we should like to emphasize that Congress has not removed the jurisdiction of the lower courts without making fair and adequate provision for a substitute remedy. This remedy we discuss in detail in a later section (*infra*, pp. 107–164). However, the character and adequacy of this remedy are, we believe, matters which

[4] All of the above cited cases were decided in favor of the Government except the *Priddy & Co.*, *Cudahy Bros. Co.*, and *Marshall Field* cases, in each of which Title VII was held to be unconstitutional.

Barlow-Moore Tobacco Co. v. *United States* (W. D. Ky.), decided December 12, 1936, not reported, certiorari denied, No. 576, October Term, 1936, also decided in favor of the Government, was a suit which was brought after the enactment of the Revenue Act of 1936.

cannot properly be considered in this case. For, as we read them, both the terms of the Constitution and the decisions of this Court compel the conclusion that Congress has a complete and unrestricted power to withdraw the jurisdiction of the inferior Federal courts over any suit, at any stage of the proceedings.

Section 1 of Article III of the Constitution provides that "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." In consequence the lower Federal courts do not derive their jurisdiction directly from Article III of the Constitution but are created by and acquire their jurisdiction from Acts of Congress. *Aetna Life Ins. Co.* v. *Haworth,* No. 446, October Term, 1936; *Stevenson* v. *Fain,* 195 U. S. 165, 167; *Ex parte Wisner,* 203 U. S. 449, 455; *Sheldon* v. *Sill,* 8 How. 441, 448. They are thus courts of limited jurisdiction and can exercise only such powers as Congress, within the limits of the Constitution, confers upon them. *Ex parte Robinson,* 19 Wall. 505, 511; *Kline* v. *Burke Constr. Co.,* 260 U. S. 226, 234; *Gillis* v. *California,* 293 U. S. 62, 66; *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551. It results that Congress, so long as it does not expand the jurisdiction beyond that specified in Article III, may give, withhold, or take away their jurisdiction in its unlimited discretion. *Sheldon* v. *Sill, supra,* 448; *DeGroot* v. *United States,* 5 Wall. 419, 432; *Case of the*

Sewing Machine Companies, 18 Wall. 553, 577; *Cary* v. *Curtis,* 3 How. 236, 244–245; *Kentucky* v. *Powers,* 201 U. S. 1, 24.

A necessary consequence of the principle "that the courts created by statute must look to the statute as the warrant for their authority" (*Cary* v. *Curtis, supra,* 244) is that no case can be decided after repeal of the statute which confers jurisdiction. It is further established by the decisions of this Court that an express or implied repeal of the jurisdictional statute leaves both the trial court and the appellate court powerless to decide cases which at the time of repeal were pending in the trial court. *Insurance Company* v. *Ritchie,* 5 Wall. 541, 544; *The Assessor* v. *Osbornes,* 9 Wall. 567, 575; *Hallowell* v. *Commons,* 239 U. S. 506, 509. Even when the repeal occurred after decision by the trial court, and pending review by this Court, it is settled that the case must be sent back to the trial court with directions to dismiss for want of jurisdiction, for "when the root is cut the branches fall." *Smallwood* v. *Gallardo,* 275 U. S. 56, 62; cf. *Western Union Tel. Co.* v. *L. & N. R. R. Co.,* 258 U. S. 13, 19.

The principles of constitutional law which must govern this case are succinctly summarized in *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234, where this Court said:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general

> government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner* v. *Bank of North America,* 4 Dall. 8, 10; *United States* v. *Hudson & Goodwin,* 7 Cranch, 32; *Sheldon* v. *Sill,* 8 How. 441, 448; *Stevenson* v. *Fain,* 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor* v. *Cooper,* 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors* v. *Osbornes,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

Petitioner objects that his constitutional rights are invaded by this withdrawal of jurisdiction. But, as this Court stated in *Kline* v. *Burke Construction Co., supra,* a right to bring suit in the Federal courts depends upon the will of Congress, and "cannot well be described as a constitutional right." Since Congress has the sole power to define the jurisdiction of the inferior Federal courts, "the statute which does prescribe

limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein." *Sheldon* v. *Sill,* 8 How. 440, 448. Phrased another way, the District Court must have Congressional authority to act, whatever may be the consequences of its inability to act. The principle was plainly stated by this Court, in regard to the strictly analogous power of Congress to make exceptions to and regulations of the appellate jurisdiction of the Supreme Court. It held, in *Ex parte McCardle,* 7 Wall. 506, 514, that:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. *Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.* And this is not less clear upon authority than upon principle. [Italics added.]

It seems, therefore, to be settled beyond any question that an inferior Federal court is possessed only of the jurisdiction which Congress has given it. Jurisdiction over this type of case has expressly been withdrawn. It would seem to follow

that the inquiry should stop at this point, for, whatever the merits of petitioner's contentions as to the status of the suit against the Collector or the character of the remedy provided by Title VII, none will serve as a substitute for Congressional authority to hear the case.

The only theory by which the remaining questions can be relevant is that which assumes that the jurisdictional provisions of Title VII are inseparably linked with the provisions which provide substantive principles and a procedural system for the recovery of the Agricultural Adjustment Act taxes. From this petitioner argues (Br. 73–74) that if these latter provisions are invalid the jurisdictional provisions must also fall, and that the earlier authority to take jurisdiction of these suits remains unimpaired. We think this theory unsound.

First. It is not at all clear that Congress would have continued the jurisdiction of the District Courts to entertain suits for the recovery of these taxes even though it had failed to provide in Section 902 that the taxpayer could recover only so far as he shows that he bore the burden of the tax. As we will later indicate (*infra*, pp. 91–95), it was common knowledge that less injustice would have been done had none of the taxes been repaid than if they had been returned in their entirety to the nominal taxpayers. While it is, of course, a matter of pure speculation, we are of the opinion that Congress would have preferred to leave these taxpay-

ers remediless rather than to present them with a gigantic bounty bearing no relation to actual losses suffered because of the Agricultural Adjustment Act taxes. Indeed, the amendments of 1935 passed the House and were favorably reported to the Senate in a form which would deny *all* possibility of recovery of these taxes (see *infra*, pp. 93–94). As to provisions other than Section 902 it is perfectly plain that, even if these had not been enacted, Congress would have deprived the District Courts of jurisdiction pending the filing of claims based upon the requirements of Section 902.[5] Petitioner does not argue to the contrary (see Br. 73–74).

In any event, Section 1002 of the Revenue Act of 1936 contains the usual separability clause. The effect of this provision is to create a presumption that each of the provisions would have been enacted separately. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184–185; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 234–235. Petitioner shows that Sections 904 and 906 (a) were necessary to

[5] If Section 907 were declared invalid, the principle of Section 902 would apply to processing taxes unaided by the assistance granted the Commissioner and the taxpayer by that Section. If Section 906 were held invalid, and assuming that we are wrong in our argument that courts cannot exercise jurisdiction merely because its withdrawal is inseparably tied to an invalid provision, the parenthetical exception of processing taxes found in Sections 904 and 905 would also fall. This would result in the District Courts and the Court of Claims having jurisdiction of suits for the refund of processing taxes, as well as floor stocks and import compensating taxes, *after a claim had been filed with the Commissioner under Title VII.*

the operation of Sections 902, 906 (b)–(g), and 907, but nothing to indicate that the former sections would not have been enacted without the latter (Br. 73–74).

Second. This Court has occasionally held inoperative certain aspects of a regulatory scheme because inseparably connected with an unconstitutional part of the Act. The theory is that one command falls with the other invalid command and the situation is as though there were no legislation. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–317; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362; *Hill* v. *Wallace*, 259 U. S. 44, 70, 71; cf. *Dorchy* v. *Kansas*, 264 U. S. 286, 290. But the Court has never, so far as we know, sanctioned the exercise of a power which requires the express consent of Congress merely on the ground that an unequivocal prohibition of its exercise was inseparably linked to an invalid provision.[8] For in such a case the one who attacks the statute cannot succeed merely by establishing that the legislation must be viewed as not enacted; he must go farther and find actual, unrepealed legislation authorizing the power whose exercise he seeks. And, as this Court said in *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544:

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[8] *National Life Ins. Co.* v. *United States*, 277 U. S. 508, seems to have allowed a tax deduction on the theory that it was separable from an invalid condition attached to it; this is not the same as though it had allowed the deduction on the theory that a legislative prohibition must be viewed as though not enacted.

> It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.

We do not believe that the doctrine as to the consequences of inseparability can be stretched to the point that a court has power to exercise jurisdiction on the fiction that Congress has conferred this jurisdiction because its prohibition was inseparably tied to invalid provisions.

Any logic which leads to a result so plainly contradictory of the purpose of Congress must be mistrusted. This is doubly so in this case, for the logic which would permit disregard of Sections 904, 906 (a), and 910 is that which assumes that an earlier authority to hear the suit is somehow revived by reason of the constructive invalidity (because inseparable) of a removal of jurisdiction. This leads into almost ludicrous complications.

(1) The District Court can exercise jurisdiction only on the theory that Sections 904, 906 (a), and 910 fall with other provisions of Title VII which are held to be invalid. (2) But if this is the case, Section 901 must also fall. Section 901 repeals Section 21 (d) of the Agricultural Adjustment Act as amended by the Act of August 24, 1935 (Sec. 30, c. 641, 49 Stat. 750). Section 21 (d) (*infra*, p. 182) in substance forbids recovery of the Agricultural

Adjustment Act taxes unless the taxpayer shows that he bore the burden of the tax. It is inconceivable, in the face of the two similar enactments, that Congress would have repealed Section 21 (d) had not Title VII been enacted in its place. (See *infra*, pp. 91–96.) (3) Petitioner has not, of course, complied with the requirements of Section 21 (d) as to (a) establishing before the Commissioner that he bore the burden of the tax, or (b) filing a transcript of the record before the Commissioner as the record in the District Court. It results, even if Title VII be held invalid in its entirety, that the court has no jurisdiction. (4) Jurisdiction may thus be asserted only if Section 21 (d) as well as Title VII be held invalid.[7] (5) If the ordinary limitations upon appellate review be applied, the validity of Section 21 (d) may not be considered by this Court, since the petitioner does not challenge the validity of that statute in this Court. *Clark* v. *Williard*, 294 U. S. 211, 216; *Morehead* v. *Tipaldo*, 298 U. S. 587, 604–605. (6) If Section 21 (d) should, however, be held invalid there remains the problem of reviving the original scope of Section 24 (5) of the Judicial Code, which has in effect been declared inapplicable to Agricultural Adjustment Act taxes by two successive Acts of Congress. We do not see how this could be

[7] We respectfully refer the Court to the Government's brief in *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110, No. 577, October Term, 1936, if the validity of Section 21 (d) should be considered in issue.

done; express authorization seems indispensable to a restoration of jurisdiction.

Thus, for the District Court to exercise jurisdiction in this case, it is necessary to disregard the express prohibition of Sections 904, 906 (a), and 910, because inseparably connected with invalid provisions of Title VII, and further to examine and hold unconstitutional an Act of Congress which has already been repealed. Such, we submit, is an extraordinary request to make of this Court when it is asked to confer jurisdiction on the District Court in the teeth of an Act of Congress. Yet such is the necessary basis of petitioner's contentions.

We believe that the unequivocal declaration of Congress that the District Courts should not have jurisdiction of suits of this nature is sufficient to dispose of this case. Even if the other provisions of Title VII should be thought inseparable, we do not see that their invalidity could operate to supply the Congressional authority which is necessary if the inferior Federal courts are to have power to act. However, in a question of this importance we prefer to err on the side of caution. In addition, we wish to make emphatically clear the fact that Title VII is not a naked exercise of the power of Congress to limit the jurisdiction of courts created by it, but also provides remedies for taxpayers which, if its adequacy were open to decision in this case, would be found to meet every requirement of the Constitution and of a government's

duty to deal fairly with its citizens. Accordingly there follows a full discussion of the power of Congress to provide this substitute method for the recovery of the taxes imposed under the Agricultural Adjustment Act.

II

Petitioner Has Not Stated a Cause of Action Against the Respondent Collector

If, for any reason, this Court should hold that the District Court might exercise jurisdiction notwithstanding the express withdrawal of jurisdiction found in Title VII, it then becomes necessary to consider that the complaint fails to state a cause of action. The District Court appears to have sustained respondent's demurrer on this ground (R. 38–39, 40).

Petitioner does not argue that his action is based on or can be maintained under the statutes of the United States (see Br. 11–12). It is quite plain that the complaint, which was framed to meet the requirements of Section 3226 of the Revised Statutes (*infra*, p. 180), does not state a cause of action under the existing statutes.

First. Section 903 (*infra*, p. 166) requires that a claim for refund be filed after enactment of the Revenue Act of 1936 and before July 1, 1937, if any refund is to be allowed. The bill contains no allegation that such claims were filed and, indeed, it affirmatively appears that the claims upon which

suit was brought were filed on June 12, 1935, and denied by the Commissioner on August 16, 1935 (R. 4, 11).

Second. Section 902 (*infra*, p. 165) provides in substance that no refund shall be made or allowed unless the claimant establishes to the satisfaction of the Commissioner or the court that he bore the burden of the tax. The bill contains no allegation that would serve to show compliance with this condition precedent.

Third. Section 910 (*infra*, p. 178) provides that no collector shall be liable for any act done in the collection of Agricultural Adjustment Act taxes, or the recovery of any of those taxes which were paid into the Treasury, if the collector acted in performance of his official duties or under the direction of the proper Government officers.[8]

It is settled beyond dispute that a statutory action for the recovery of Federal taxes cannot succeed unless there has been full and exact compliance with the procedural and substantive provisions upon which the right of action is conditioned: "Men must turn square corners when they deal with the Government." *Rock Island R. Co.* v. *United States*, 254 U. S. 141, 143; see also *Cheatham* v. *United States*, 92 U. S. 85, 88–89; *United States* v. *Michel*, 282 U. S. 656, 659. The rule is as fully applicable when suit is brought against the Collector as when it is brought against the

[8] This provision has also been treated as depriving the District Court of jurisdiction. See footnote 2, *supra*, p. 19.

United States. *The Collector* v. *Hubbard*, 12 Wall. 1, 14–15; *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Savings Institution* v. *Blair*, 116 U. S. 200, 205–206; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429–430; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 403. Nor does it make any difference that the conditions of suit are imposed after the cause of action had accrued under the earlier statutes. *The Collector* v. *Hubbard*, *supra*, 14–16; *Graham & Foster* v. *Goodcell*, *supra*, 429–430; *United States* v. *Jefferson Electric Co.*, *supra*, 401–402.

It is thus plain that Sections 902, 903, and 910 must each be held unconstitutional if petitioner is to secure reversal of the decision below. (1) Section 903 is admittedly a procedural adjunct of Section 902 and need not be discussed separately. (2) Section 910 of itself is sufficient to bar this action if it be viewed as an assertion of the sovereign's immunity to suit. Since Congress has provided an adequate remedy in place of that against the Collector, it is unnecessary to decide this case on the ground of the sovereign immunity (see *infra*, pp. 72–77). It should, however, be noted that the decision below cannot be reversed without a decision that the Government has not the same control over suits against the Collector that it has over suits against itself. (3) Section 902, and other aspects of the remedy provided by Title VII, are

fully discussed in later portions of this brief (*infra*, pp. 107–164).

Before proceeding with a discussion of the constitutionality of the remedy provided by Title VII for the recovery of Agricultural Adjustment Act taxes it is first necessary to consider at some length two points strenuously argued by petitioner and *amici curiae*. The first deals with a special immunity supposed to be lent the cause of action against the Collector because it is said to be based on the common law. The second asserts a vested right in the particular cause of action which accrued to petitioner prior to the enactment of the Revenue Act of 1936. We discuss these contentions in the next two sections of our brief.

III

The Complaint Does Not and Cannot State an Action at Common Law

Petitioner and *amici curiae* insist that the action against the Collector is one which is granted by the common law. From this they draw three conclusions. (1) The "vested right of action" runs against the Collector personally and cannot be subjected to the control which the Government exercises over suits against itself (Br. 18–19). (2) Maintenance of the right of action against the individual officer is essential to the continuation of constitutional government (Br. 19–23; Mr. Donald's Brief, *passim*). (3) There is also a sugges-

tion that a common law cause of action has a greater immunity to legislative control than does one based on a statute alone (Br. 26–27). These conclusions would not follow were the premise granted that the action is one to be found at common law. This, however, we do not discuss, for it seems clear that an action against the Collector may not be brought at common law under circumstances such as these.

1. THE ACTION AGAINST THE TAX COLLECTOR

A basic principle in the law of agency is that the agent of a known principal is not liable for the repayment of funds which he has transmitted to his principal. *Sadler* v. *Evans*, 4 Burr. 1984; *Bullar* v. *Harrison*, 2 Cowp. 565; *East India Co.* v. *Tritton*, 3 B. & C. 280; *White* v. *Bartlett*, 9 Bing. 378; *Hooper* v. *Robinson*, 98 U. S. 528, 540–541; *Baldwin* v. *Black*, 119 U. S. 643, 647. While the general rule is that notice of the claim before transmission by the agent to the principal is sufficient to hold the agent, it appears to be settled that a public agent who is under a duty to pay the money over irrespective of opposing claims will not be held. As early as 1792 Lord Kenyon, in *Greenway* v. *Hurd*, 4 Term R. 553, 555, with specific application to a crown revenue agent, said:

> If the defendant had not paid the money over, he would have subjected himself to punishment; and it would be hard that he should also be punished by an action if he did pay it over.

See also *Horsfall* v. *Handley*, 8 Taunt. 136, 138. When a test case was desired, the collector retained the money in his hands, with the consent of the Attorney General. *Campbell* v. *Hall*, 1 Cowp. 204. And in *Whitbread* v. *Goodsbank*; 1 Cowp. 66, 69, Lord Mansfield insisted that the record show a similar action was a consent suit, else "it might be of great inconvenience if this case should hereafter be made a precedent."*

This rule has been fully accepted and often applied by this Court. *Elliott* v. *Swartwout*, 10 Pet. 137, was decided in 1836. At that time the Collector was under no duty to pay into the Treasury taxes paid under protest. This Court held that illegal taxes paid under protest could be recovered from the Collector, even though he had paid them into the Treasury, while taxes whose payment was not protested could not be recovered from the Collector after payment into the Treasury. In consequence of Swartwout's subsequent and natural re-

* These early cases seem still to be the law. The absence of more recent cases may be traced to the availability of special statutory remedies. See, for example, 8 & 9 Geo. V, c. 40, Secs. 147–151; 57 & 58 Vict., c. 30, Sec. 8 (12); 23 & 24 Geo. V, c. 36. It is significant that, in numerous cases attempting to bring a petition of right or mandamus to recover taxes (remedies conditioned upon the absence of another remedy), the courts have never suggested the availability of assumpsit. *The Queen* v. *The Commissioners*, 12 Q. B. D. 461; *Holburn Viaduct Land Co.* v. *The Queen*, 52 J. P. 341; *Commissioners* v. *Pensel* [1891], A. C. 531; *Malkin* v. *King*, 2 K. B. 886; *William Whitley, Ltd.* v. *Rex*, 127 L. T. 619; *Bristol Channel Steamers, Ltd.* v. *The King*, 40 T. L. R. 550.

fusal to pay protested taxes into the Treasury, coupled with his regrettable tendency to speculate with public funds (see *Barney* v. *Watson*, 92 U. S. 449, 452; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 275), Congress in 1839 provided (c. 82, 5 Stat. 339) that all taxes should be paid into the Treasury, irrespective of protest, and provided for the refund of illegal taxes by the Secretary of the Treasury. The effect of this Act was considered in *Cary* v. *Curtis*, 3 How. 236. The Court held that an action of assumpsit could no longer be brought against the Collector. Since he was under a duty to pay the money over to his principal, the law would not imply a promise to the taxpayer that it would be refunded if illegal. The reasons which compel this result are perhaps best stated in *Curtis's Administratrix* v. *Fiedler*, 2 Black. 461, 478:

> *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. Such a promise, says the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Collectors under the act referred to were re-

> quired to pay all moneys received for unascertained duties or for duties paid under protest into the Treasury of the United States, and consequently this Court held that in a case arising under that law, where that duty had been performed by the collector, the law would not imply a promise on his part to pay the same back to the importer, because he was under no obligation to pay the money twice, and to have paid the same back to the importer in the first place would have been contrary to his official duty as prescribed by an Act of Congress. * * *.

It is plain that any other result would do violence to the equitable principles upon which the action for money had and received is based. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 402–403; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 309–310.

This Court has many times reaffirmed the principle that there can be no common law action against a Collector for the recovery of taxes after he has paid them into the Treasury pursuant to his statutory duty, and that whatever remedy the taxpayer may have is solely the creation of the statute.[10] *Nichols* v. *United States*, 7 Wall. 122, 126–127;

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[10] The Act of February 26, 1845, c. 22, 5 Stat. 727, enabling suit to be brought against the customs collector, was passed shortly after the decision in *Cary* v. *Curtis*, *supra*, because the Act of 1839 "was not intended to bar the right of the importer to maintain a suit at law for the recovery of duties illegally collected." 14 Cong. Globe 195, 28th Cong., 2d Sess.

Barney v. *Watson*, 92 U. S. 449, 452; *Arnson* v. *Murphy*, 109 U. S. 238, 240, 243; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Schoenfeld* v. *Hendricks*, 152 U. S. 691, 693. The principle is as fully applicable to suits against the collectors of internal revenue as to those against the collectors of customs. *Philadelphia* v. *Collector*, 5 Wall. 720, 731–735; *The Collector* v. *Hubbard*, 12 Wall. 1, 12–14; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383. See also *Ex parte Bakelite Corp.*, 279 U. S. 438, 451; *Crowell* v. *Benson*, 285 U. S. 22, 50–51.

These decisions are unequivocal. Their principle, that there can be no common law action in assumpsit against the Collector for the recovery of taxes paid into the Treasury, has expressly been stated by this Court in numerous cases extending over a period of almost a century. The proposition must be taken to be settled.

Petitioner, in his attempt in effect to secure reversal of this line of authority, relies on several decisions of this Court which emphasize that the action against the Collector has the procedural consequences of a suit against an individual rather than one against the Government. We do not, of course, question the soundness of these decisions; if Congress chooses to extend a remedy in the form of a personal action, it must be taken to have intended that the ordinary procedural incidents of such an action would be operative. Thus, in *Patton* v. *Brady*, 184 U. S. 608, 612–615, this Court held that after the death of the Collector the suit could

be revived against his executrix. Correlatively, it held in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1 (followed in *Union Trust Co.* v. *Wardell*, 258 U. S. 537, 542), that the action could not be brought against the Collector's successor in office. In *Sage* v. *United States*, 250 U. S. 33, 37, a judgment against the Collector was held to be no bar to suit against the United States for recovery of the balance of the taxes overpaid. In *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, 312, it was held that a judgment against the Collector was not *res judicata* against the United States. On the other hand, in *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 627, the Collector was held estopped by a judgment against the United States or his superior the Commissioner. Finally, in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430–431, this Court stated *obiter* that the action against the Collector was not subject to the same control by the sovereign as one against the United States.

It is plain that none of these decisions can be stretched into a holding that the suit against the Collector is one authorized by the common law alone. Apart from the dictum in the case last discussed, which can have no bearing upon the statutory or common law nature of the action, the cases merely adopt the natural procedural consequences of the statutory choice of a suit against the Collector. It is true that a number of these cases state that the action is "personal." *Sage* v. *United States, supra*, 37; *Smietanka* v. *Indiana Steel Co.*,

supra, 4; *Graham & Foster* v. *Goodcell*, *supra*, 430; *Tait* v. *Western Maryland Ry. Co.*, *supra*, 627. This by no means is a decision that the action is one which is recognized by the common law. A statutory right of action, as fully as one at common law, may be "personal" rather than against the Government. *Patton* v. *Brady* allowed revivor against the executrix because of the implied promise upon which the action of assumpsit was based. This decision cannot be taken to overrule the established principle of *Cary* v. *Curtis*, *supra*, and can mean no more than a recognition that Congress had chosen to adopt the fiction of an implied promise. *Sage* v. *United States*, *supra*, 37, and *Smietanka* v. *Indiana Steel Co.*, *supra*, 4, emphasize that the Government is not certain to pay any judgment entered against the Collector, since a certificate of probable cause or action in the course of official duty is required. But this in no manner serves to make the action one at common law and, in any event, this Court has since held that the certificate must issue as of right and that the Government's lack of privity is nominal only. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 381–383. It results that not only the actual decisions but the reasoning of these cases is wholly compatible with the established doctrine that the suit against the Collector is a statutory rather than common-law cause of action.

The complaint makes no allegation that the respondent collected these taxes outside his official duties, or that the collection was not authorized by

the Agricultural Adjustment Act. Irrespective of any protest by petitioner the respondent was under statutory duty to make daily payments of these taxes into the Treasury. Section 3210 of Revised Statutes; U. S. C., Title 26, Sec. 1761. Repeated decisions of this Court demonstrate that the taxpayer cannot bring a common law action in such a situation. It should be noted, moreover, that a part of the taxes here involved were not paid under protest (R. 19).

It is unnecessary to consider whether detinue, or possibly replevin, could be brought, for here the Collector is not in possession of goods distrained or specific moneys collected under the authority of the Agricultural Adjustment Act. It is also unnecessary to consider whether trover would lie had the taxes been collected by the seizure of chattels. See *Cary* v. *Curtis,* 3 How. 236, 250. These actions, of course, would so rarely be available that they may be dismissed without further discussion. Petitioner does not argue that he can frame an action in the form of detinue, replevin, or trover, but merely that the possibility exists (Br. 26).

2. OFFICIAL LIABILITY GENERALLY FOR ACTING UNDER AN UNCONSTITUTIONAL STATUTE

We freely concede that the Collector is liable if he acts outside the scope of his authority and collects, under the color of his office, taxes which are plainly unauthorized. See *In re Fassett,* 142 U. S. 479, 487; *De Lima* v. *Bidwell,* 182 U. S. 1, 179. In this regard the Collector is in the same

position as is any other officer of the Government. Section 989 of the Revised Statutes has always excluded collections made in a spirit of individual oppression from the operation of its provisions for reimbursement of the Collector by the Government. The Revenue Act of 1936 does not attempt to remove this liability; Section 910 merely removes the Collector's liability for collecting and paying into the Treasury Agricultural Adjustment Act taxes under the authority of the statute or at the direction of his superior officers.

However, the bill alleges that the taxes were collected under the Agricultural Adjustment Act (R. 2, 9) and there is no suggestion but that the respondent's action was in performance of his official duties under that Act. An action at common law can, therefore, be maintained only if the Collector is placed in the same position as though he had acted in a spirit of malice, personal oppression, or reckless disregard of his duties, because this Court subsequently declared the taxes unconstitutional in *United States* v. *Butler*, 297 U. S. 1. We submit that any such result is contrary to the decisions of this Court and to the better considered decisions of other courts and might lead to the breakdown of governmental administration.

1. The action against the public officer for wrongs committed under the color of authority is an expression of the great principle of Anglo-American law which subjects public officers as well as citizens to the sanctions of the law. It is designed to protect the citizen from arbitrary action

from an especially dangerous source.[11] As Chief Justice Holt said in *Ashby* v. *White*, 22 Ld. Raym. 938, 956:

> If publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences.

Lord Mansfield, in *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 175, expressed the matter with even greater vigor:

> Therefore to lay down in an English court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

2. The translation of the English doctrine into American law admits, in theory, of either of two

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[11] It is true that a direction by his superior grants no immunity to the officer, for as "the King can not do wrong", he "cannot authorize wrong". *Money* v. *Leach*, 3 Burr. 1742; *Sultan* v. *Johnstone*, 1 Term. R. 493; *Feather* v. *The Queen*, 6 B. & S. 257, 296–297; *Cobbett* v. *Grey*, 4 Exch. 729; *Johnstone* v. *Pedlar* [1921] A. C. 262, 271, 275, 295. But it is significant that these cases hold that both the officer who actually commits the wrong and the superior who directed him are subject to liability. In other words, the proximate wrongdoer is being punished not merely for proceeding upon defective authority but because he has participated in a disobedience of the law.

results. On the one hand, its application might be made in the light of the statement sometimes made, in regard to different situations, that an unconstitutional statute is void *ab initio,* and as though it had never been enacted. *Norton* v. *Shelby County,* 118 U. S. 425, 442; *Chicago Ry. Co.* v. *Hackett,* 228 U. S. 559, 566. If this doctrine were applied literally to the officer's liability for acting under an unconstitutional statute it would be held that he was acting without any authority whatever and his action would thus be the act of an individual bent on oppression. On the other hand, a less superficial approach would start from the reason lying back of the English rule and would find no danger of individual oppression in obedience to a statute subsequently held unconstitutional. It would recognize that the statute was in fact enacted and that no subordinate officer can be expected to set himself up as constitutional arbiter on the validity of an Act passed and thought constitutional by the Congress. Under this approach, the officer who enforces an unconstitutional Act would not be held personally liable.

The American cases have adopted both theories. Their results are divergent and defy even approximate reconciliation. The opposing doctrines in the state cases may be illustrated by the reasoning of two cases. In *Fisher v. McGirr,* 1 Gray 1, 46 (Mass.), the court said:

> The law relied on for a justification, being void, gave the magistrate no jurisdiction

> and no authority to issue the search warrant, the officer cannot justify the seizure under it, and therefore an action lies against him for the taking.

Against this may be placed the approach of the court in *Dexter* v. *Alfred,* 64 Hun. 636, 638 (N. Y.):

> It was no part of the duty of the commissioner of highways to decide whether the law in question was or was not constitutional. His duty was to execute the law as he found it.

The state cases seem, roughly, to be divided about equally between these two views and we believe that neither can be said to be supported by the weight of authority. It seems that nothing can be gained by any extended analysis of their holdings.[12]

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[12] The most extensive analysis is found in Field, *Effect of an Unconstitutional Statute*, pp. 119–149; also published as *Unconstitutional Statutes and Public Officers*, 77 U. of Pa. Law Rev. 155. He comes to the conclusion that the cases are irreconcilable, but that there is a tendency to exonerate the officer (1) in the more recent cases, and (2) when he acts in a quasi-judicial capacity. It should also be noted that his examination indicates that tax collectors are generally held liable. See, however, the additional cases cited below.

In addition to the numerous cases cited by Field, the following may also be noted: *American Bonding Co.* v. *People*, 53 Col. 512 (tax collector not liable); *Phelan* v. *San Francisco*, 120 Cal. 1 (tax collector not liable); *Hartford Fire Ins. Co.* v. *Jordan*, 168 Cal. 270 (tax collector not liable); *Calhoun* v. *Little*, 106 Ga. 336 (magistrate not liable); *Anheuser-Busch Brewing Ass'n* v. *Hammond*, 93 Iowa 520 (marshal and constable not liable); *Smith* v. *First Nat. Bk. of Tecumseh*, 17 Mich. 479 (tax collector liable); *State* v.

3. We submit that this Court has definitely adopted the view that the officer is not to be viewed as a personal trespasser merely because of the fiction that an unconstitutional statute was never enacted.

First. In *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113, this Court said that, in the light of its earlier decision in *United States* v. *Butler*, 297 U. S. 1, "If the respondent should *now* attempt to collect the tax by distraint he would be a trespasser." (Italics added.) The implication seems inescapable that, as to taxes collected prior to the *Butler* decision, the collector would not have been a trespasser. In *Burrill* v. *Locomobile Co.*, 258 U. S. 34, 38, the Court held that a state could make exclusive the remedy against itself for the collection of an unconstitutional tax. If there were any doubt, it would be removed by the decision in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382, where this Court said:

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. *He is not suable as a trespasser*, nor is he to pay out of his own purse. [Italics added.]

Second. It is the settled doctrine of this Court that a public official has no standing to attack the constitutionality of a statute which he is under a

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McNally, 34 Me. 210 (magistrate not liable); *Logan City* v. *Allen*, 44 P. (2d) 1085 (Utah) (tax collector not liable); *Lang* v. *Mayor*, 74 N. J. L. 455 (police commissioner not liable).

duty to enforce."[13] *Caffrey* v. *Oklahoma Territory*, 177 U. S. 346, 348; *Smith* v. *Indiana*, 191 U. S. 138, 148–149; *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 198; *Marshall* v. *Dye*, 231 U. S. 250, 257–259; *Stewart* v. *Kansas City*, 239 U. S. 14, 16; *Columbus & Greenville Ry.* v. *Miller*, 283 U. S. 96, 99–100. These cases were grounded solely upon an absence of personal interest, although the Court in *Smith* v. *Indiana*, *supra*, 148, also said in dictum:

> * * * there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution.

The holding that an absence of personal interest precludes attack on the statute necessarily implies that the officer may enforce or obey the statute without fear of personal liability. For, if he should refuse to enforce or obey a constitutional statute, there seems to be no question but that, in addition to incurring whatever penal sanctions the government might invoke, he would be liable to any person injured by his refusal. *Morris* v. *People*, 3 Denio. 381 (N. Y.); *Clark* v. *Miller*, 54 N. Y. 528. If the officer were to be held liable, on the other hand, were he to enforce or obey a statute which

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[13] The earliest of this line of cases is to the contrary. *Huntington* v. *Worthen*, 120 U. S. 97, 101–102. It has, however, necessarily been overruled by the subsequent cases discussed in the text.

was later held unconstitutional, it is plain that he would have no choice which would surely exempt him from liability. The denial of a personal interest in the officer who attacks the statute is thus the equivalent of a holding that he is not to be liable for enforcing an unconstitutional statute. It is significant that *Huntingdon* v. *Worthen*, 120 U. S. 97, 101–102, which was in effect overruled by the line of cases beginning with the *Caffrey* and *Smith* cases, stated that "an unconstitutional statute is not a law; it binds no one, and protects no one." The reversal of its result must imply a disapproval of its premise.

Third. It has been established by repeated decisions of this Court that allegations that a tax is unconstitutional will not serve to bring a bill to enjoin its collection within the equity jurisdiction of a Federal court. *Shelton* v. *Platt*, 139 U. S. 591, 600; *Pittsburgh Ry.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452; *Dodge* v. *Osborn*, 240 U. S. 118, 121; *Bailey* v. *George*, 259 U. S. 16, 20. If this Court were of the opinion that an unconstitutional statute was void *ab initio* for all purposes, the collector, in threatening to collect the taxes, would be threatening to commit a serious trespass which could be enjoined. *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113. It must follow that, whether or not the statute is ultimately held to be constitutional, the tax collector is acting, not as an individual who is threatening the use of force and

distraint toward an end of private or malicious oppression, but as an agent of the government and endowed with its authority.

Fourth. The exaction, under statutory authority, of a tax later determined to be unconstitutional should place the Collector in no worse position, surely, than the ministerial exaction in good faith of an excessive or otherwise unauthorized tax. In each case the Collector is acting under supposed authority which later develops to be lacking. In the case of an excessive or illegal tax, the rule is settled that the Collector who distrains in order to collect such a tax is not personally liable as a trespasser. *Erskine* v. *Hohnbach*, 14 Wall. 613, 616–617; *Haffin* v. *Mason*, 15 Wall. 671, 675; *Harding* v. *Woodcock*, 137 U. S. 43; *Stutsman County* v. *Wallace*, 142 U. S. 293, 309–310; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 381. In the *Woodcock* case the Court said (p. 48):

> Nor could the collector consider whether in the pending action it might not be ultimately determined that the taxes were illegal which he was endeavoring to collect. He had completed his duty more than a year before that decision was rendered. Had the judgment of their illegality been pronounced before the enforcement of the assessment by the collector, and been brought to his notice, a different question might possibly be raised.
>
> What remedy the plaintiff may have for the loss of his property or for the amount

> of the proceeds obtained on its sale, we are not called upon to determine in this case. There may be, perhaps, a claim against the government. All that we decide is, that a liability cannot be fastened upon the collector, a ministerial officer, for the enforcement of an assessment for taxes regular on its face, made by the Commissioner of Internal Revenue. Of such an officer the law exacts unhesitating obedience to its process.

In the *Erskine* case the Court pointed out the analogy to the sheriff or marshal who levies execution under a writ valid on its face. Whatever the illegality which lies back of the writ, the executing officer cannot be held personally liable. *Bryan* v. *Ker*, 222 U. S. 107, 113–114. It must, in our view, follow that the Collector is not a trespasser in collecting an unconstitutional tax, any more than in the case of taxes otherwise illegal.

Fifth. The action of an officer in enforcing an order or a statute may be illegal when done but may be cured by ratification if Congress could originally have authorized it. *Hamilton* v. *Dillin*, 21 Wall. 73, 96; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 11; *Hodges* v. *Snyder*, 261 U. S. 600, 603; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429; see also *United States* v. *Heinzen*, 206 U. S. 370, 382; *Swayne & Hoyt, Ltd.* v. *United States*, No. 494, October Term, 1936. If petitioner's argument (Br. 13–15) is sound that a cause of action against the officer cannot be di-

vested once it has accrued, it must follow that the officer prior to the ratification was not liable for action taken in the course of his official duties.

Petitioner relies upon several cases dealing with suits against collectors of state taxes (Br. 20–22). None is a decision that the mere illegality of the collection, as subsequently determined, converts the collector into a trespasser.

Thus, *Poindexter* v. *Greenhow*, 114 U. S. 270, was an action of detinue, which possibly might be brought against the Collector if the circumstances were similar. There a state tax collector had seized property on the nonpayment of taxes; the plaintiff had tendered coupons on bonds issued by the state and guaranteed to be accepted for taxes. The Court held that the action could be maintained, Chief Justice Waite and Justices Bradley, Miller, and Gray dissenting. We admit that the language in the opinion which petitioner quotes (Br. 20–21) offers it support. There is, however, no occasion to consider whether it can be squared with subsequent decisions of this Court, for the opinion is based upon the premise that the plaintiff was seeking constitutional protection for rights based on a contract, for breach of which there was no right of action against the State. It therefore expressly distinguished the case presented by suits for the refund of taxes (pp. 300–301). So, too, in *Atchison Ry. Co.* v. *O'Connor*, 223 U. S. 280, 285, the suit

was for the recovery of taxes still held by the collector.

Scott v. *Donald,* 165 U. S. 58, was a suit in which a constable was held liable for destroying liquor under the pretended authority of an unconstitutional statute. It is not authority for petitioner. The officer was acting willfully and maliciously (see pp. 82, 86). Moreover, only passing attention was paid to the liability of the officer, and that only in regard to the question of whether he was liable for exemplary damages.

Cruickshank v. *Bidwell,* 176 U. S. 73, 81, is, if anything, authority for the Government. It merely refused to enjoin the enforcement of a customs law alleged to be unconstitutional.

Finally, it must be noted that the broad dicta found in a few of the cases, that an unconstitutional statute is wholly void *ab initio,* and binds or protects no one, have never been used by this Court, so far as we know, to impose personal liability upon an officer. *Norton* v. *Shelby County,* 118 U. S. 425, held that an unconstitutional agency could not bind the county on a subscription to railroad bonds. *Huntington* v. *Worthen,* 120 U. S. 97, subsequently overruled (see *supra,* p. 49), held that a state officer had standing to attack the validity of a state statute. *Hopkins* v. *Clemson College,* 221 U. S. 636, held that a state agricultural college was liable for flooding the plaintiff's lands. *Chicago Ry. Co.* v. *Hackett,* 228 U. S. 559, held that

the First Employers' Liability Act did not supersede state statutes because it was unconstitutional.

We therefore submit that the only conclusion which can be drawn from the decisions of this Court is that the Collector who enforces an Act of Congress cannot be held personally liable as a trespasser even though the Act subsequently be held unconstitutional.

4. If there were any doubt on the question, the briefest attention to the consequences of a decision holding the officer personally liable must compel a decision to the contrary. In case of collectors of internal revenue, the judgments would probably be paid by the United States under Section 989 of the Revised Statutes, since the judge may grant a certificate upon a showing that the Collector acted under the direction of his superior officers. But the question is far larger than that immediately presented, since the other officers of the Government do not have a similar protection.

The duty of the subordinate official is to enforce the law as it is enacted. If the law be invalid, the fault lies with the Congress and not with the official. If each of the thousands of Government officials charged with the enforcement or the application of the law to the citizens were to be held liable for obeying an act of Congress which might later be held invalid, the result would of necessity be the partial breakdown of government, except so far as this Court had expressly upheld each law whose constitutionality was questioned. Our Con-

stitution knows only one body, the judiciary, that is empowered to take issue with the Congress on the constitutionality of its enacted legislation. It is a rule of absolute necessity that of ministerial officers "the law exacts unhesitating obedience to its process." *Harding* v. *Woodcock,* 137 U. S. 43, 48. Orderly government requires that subordinate officials devote their efforts not to the subtle dialectics of constitutional law but to the enforcement of the laws as found in the statute books.

A decision based on these principles does not present the threat to the liberties of the citizen which petitioner seems to envision. If regard be had to the reason of the rule of personal liability of officers, to prevent individual oppression under color of office, the needs of the Government and of the citizen can both be reconciled. Such has been the path chosen by two Attorneys General. In 10 Op. A. G. 56, 61, Attorney General Bates said:

> There may possibly arise cases of plain and obvious conflict between the provisions of the Constitution and the provisions of a statute. In such cases, there is no room for construction, no ground for argument; and in all such cases, not only the judiciary Department, but every Department, and indeed every private man who is required to act upon the subject matter, must determine for himself what the law of the land, as applicable to the case in hand, really is. * * *

> This is predicated of cases where the conflict of law is plain and obvious. But in cases in which the conflict of law is doubtful, and its existence has to be made out by argument, I think it is far more prudent for the administrative officer to follow the statute, and leave the party who may be dissatisfied with the decision to seek his remedy in the courts. * * *

And Acting Attorney General Davis, in 31 Op. A. G. 213, 215, said:

> I concur in the view thus expressed that, unless the conflict between the law in question and the Constitution be plain and obvious, it is the duty of the administrative officer to comply with the provisions of the statute, leaving the question of its constitutionality to be determined by the courts.

We therefore submit that the doctrine of personal liability of public officers is inapplicable where the action results not from disobedience of enacted law but from enforcement of a law subsequently held invalid. In the latter case the officer himself presents no threat to the rights of the citizen. He acts under command of the legislature itself, and any right to redress must of necessity lie against the Government alone. A decision to the contrary would necessarily place the palpable fiction that an unconstitutional statute was never enacted above the needs of an orderly administration of government.

IV

Petitioner Has No Vested Right in the Earlier Procedure and Congress Has Full Power to Substitute a New Remedy for the Refund of Taxes

This section is devoted to answering petitioner's argument (Br. 10–18) that it had a vested right in the procedure for the refund of taxes which existed at the time it paid its taxes, or at the time the Commissioner denied its claim for refund. For, just as the nature and adequacy of the remedies provided by Title VII are immaterial if the Government should prevail in its contention as to the jurisdiction of the District Court, so too are they immaterial if petitioner should prevail in its contention that any change in the remedies existing for the refund of Agricultural Adjustment Act taxes was forbidden by the Constitution.

The ordinary procedure for the recovery of an overpayment of Federal internal revenue taxes, whose refund was denied by the Commissioner, was to bring suit either against the Collector or against the United States (R. S., Secs. 989, 3220, 3226; Judicial Code, Sec. 24 (5), (20); U. S. C., Title 26, Secs. 482, 1670 (b), 1672–1673, Title 28, Sec. 41 (5), (20)). In the case of certain manufacturer's excise taxes, the taxpayer could recover only by showing, in substance, that he bore the burden of the tax (Section 424, Revenue Act of 1928, c. 852, 45 Stat. 791; Section 621, Revenue Act of 1932,

c. 209, 47 Stat. 169); otherwise the taxpayer was entitled to recover on mere proof of payment in excess of the amount legally due.

Congress changed this system so far as the recovery of taxes paid under the Agricultural Adjustment Act is concerned. Section 21 (d) of that Act (*infra*, p. 182) provided, in substance, that recovery of these taxes would be allowed only so far as the taxpayer showed that he bore the burden of the tax himself. Title VII of the Revenue Act of 1936 in Section 902 continued this basic principle and, in Section 907, provided means by which to determine whether or not the taxpayer had borne the burden of the processing tax. In Section 910 it removed the liability of the Collector for the collection of taxes under the authority of the Agricultural Adjustment Act, thus leaving a proceeding against the Government as the exclusive remedy in the event the Commissioner should deny a claim for refund. In the case of floor stocks and import compensating taxes, this denial would permit suit in either the District Court or the Court of Claims under Section 905. In the case of processing taxes, review of the Commissioner's disallowance of a refund claim occurs in the first instance in the Board of Review, established in the Treasury Department by Section 906. This administrative tribunal, by a procedure analogous to that of the Board of Tax Appeals, is to hear the controversy between the Commissioner and the taxpayer and

must make findings of facts and conclusions of law. Either the Commissioner or the taxpayer may petition a circuit court of appeals or the Court of Appeals for the District of Columbia for a review of questions of law; this Court may, upon petition for a writ of certiorari, review the decisions of those courts.

1. THE PETITIONER CONFUSES RIGHT WITH REMEDY

We believe that, properly speaking, there is no controversy between the petitioner and the Government as to the power of Congress to change the remedies available to taxpayers who are entitled to a refund. Thus, petitioner concedes (Br. 15) "the States or the Federal Government can go far, consistently with due process of law, in changing court procedures and the remedies provided for the enforcement of vested rights." Its argument appears to be that its "vested right" to the recovery of all Agricultural Adjustment Act taxes cannot constitutionally be destroyed by a purported change in procedure (see Br. 15–18).

If by vested right the petitioner means one which is protected by the Constitution, we are in complete agreement. By this view, the issue then becomes not whether the Congress can interfere with "vested rights" but whether or not the petitioner has a constitutional right to recover back illegal taxes whose economic burden he has not borne. If there is such a constitutional right, the provisions of Title VII would be invalid whether enacted be-

See 902

fore or after the taxes were paid. If there is no such constitutional right, it is immaterial whether Title VII was enacted before or after petitioner's claim accrued.

However, we are not sufficiently certain that we understand petitioner's position to warrant proceeding at once to the merits.[14] Accordingly, the next division of this section demonstrates with perhaps unwarranted elaboration that Congress has a full power at any time to change the remedies open to taxpayers for recovery of taxes paid.

Before proceeding to that discussion, however, we wish to point out that, so far as petitioner's claim is based upon a right protected by the Constitution, Title VII neither impairs nor changes that right. At the time these taxes were paid, petitioner was entitled under the existing statutes to recovery of their full amount if illegal. So far as this amount represented taxes whose economic burden petitioner had borne, it may here be assumed that this was a constitutional right. So far as it represented taxes whose burden had been borne by others, the petitioner had no constitutional right

[14] Thus, petitioner states (Br. 14) that the application of the principle of *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, has no application to its argument based on vested rights. And the very emphasis which it places on the fact that its claim accrued prior to the enactment of the Revenue Act of 1936 indicates that the change itself somehow lends a vulnerability to a remedy otherwise immune to constitutional attack.

to their recovery. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386; see *infra*, pp. 120–139.

Title VII in no sense impairs the right to recover the taxes for which petitioner may claim constitutional protection. Under the earlier procedure the taxpayer sought to reach the Treasury of the United States, whether he brought suit against the Collector or the United States. This he may still do. Under the earlier procedure, the taxpayer obtained a money judgment supported by the faith and credit of the United States. This he may still have. Under the earlier procedure the taxpayer could obtain judicial determination of his right to a refund. This is still open to him, with the sole exception that the Commissioner's denial of processing tax refund claims is initially to be heard by an administrative tribunal. Thus, prior to the enactment of Title VII, taxpayers had the choice of two routes by which to reach the Treasury of the United States. Congress has withdrawn one, the suit against the Collector, and has left the other without modification relevant to petitioner's constitutional rights.

2. CONGRESS HAS COMPLETE POWER AT ANY TIME TO CHANGE THE TAXPAYER'S REMEDY

Petitioner's argument appears, however, to be in part that the substitution of a changed remedy was beyond the constitutional power of Congress merely because of a vested right in the continuation of the remedies existing at the time he paid the taxes or was in a position to bring suit for their

recovery. (Br. 15–18.) This argument is apparently based on the proposition that the fact of change alone makes the new remedy unconstitutional. The contention ignores the thoroughly settled principle of constitutional law that the legislature has complete authority to substitute one remedy for another, whether between private citizens or against the Government.

1. The general principles are well established. No one has a vested right in any mode of procedure or in any particular remedy. *Railroad Co.* v. *Grant,* 98 U. S. 398, 401; *League* v. *Texas,* 184 U. S. 156, 158; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 569; *Luria* v. *United States,* 231 U. S. 9, 26–27; *Crane* v. *Hahlo,* 258 U. S. 142, 147. Even under the additional limitation of the contracts clause, if the remedy which the state legislature substitutes is reasonable and adequate, none can complain because his expectation of having the old remedy available has been destroyed. *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 439; *Home B. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 433; *Richmond Mortgage Corp.* v. *Wachovia Bank,* No. 235, October Term, 1936.

The doctrine of these cases has been applied in a wide variety of situations. We shall list a few of them by way of illustration. Congress has unquestioned power, even after final judgment has been rendered, to provide for appellate review. *Freeborn* v. *Smith,* 2 Wall. 160; *Stephens* v. *Cherokee Nation,* 174 U. S. 445. Statutes of limitation may

be modified even though the modification reimposes a liability thought to have been barred. *Campbell* v. *Holt*, 115 U. S. 620. The defense of usury may be eliminated retroactively. *Ewell* v. *Daggs*, 108 U. S. 143. Statutory provision for interest on unliquidated damages may be made applicable to prior breaches of contract. *Funkhouser* v. *Preston Co.*, 290 U. S. 163. The imposition of new procedural conditions to the power of creditors to bring suit offends against neither the contracts nor the due process clauses. *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437; see *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 680. An ineffective registration of mortgages may be validated although it eliminates intervening judgment liens. *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505; *Watson* v. *Mercer*, 8 Pet. 88, 100. Nonjudicial forfeiture of lands for failure to pay the purchase price may be substituted for judicial forfeiture. *Wilson* v. *Standefer*, 184 U. S. 399; *Pittsburg Steel Co.* v. *Baltimore Society*, 226 U. S. 455; *Penniman's Case*, 103 U. S. 714. A mechanic's lien may be extended to cover the land as well as the building, even as against a prior mortgage. *Red River Valley Bank* v. *Craig*, 181 U. S. 548. The period necessary to give title by adverse possession may be reduced by the legislature. *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140; *Atchafalaya Co.* v. *Williams Co.*, 258 U. S. 190. Even after a judgment of condemnation, if the case is not finally closed, the legislature may destroy the power to

condemn or the mode of ascertaining damages. *Western Union Tel. Co.* v. *Louisville & Nashville R. Co.*, 258 U. S. 13; *Crane* v. *Hahlo*, 258 U. S. 142. Statutes providing a more expeditious or a wider enforcement of stockholder's liability, or adversely modifying the creditor's remedies against the stockholder, do not violate due process. *Bernheimer* v. *Converse*, 206 U. S. 516; *Shriver* v. *Woodbine Bank*, 285 U. S. 467, 479; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 755; *Davis* v. *Mills*, 194 U. S. 451.

2. Title VII forbids suit against the Collector who acted in his official duty, and permits suit only against the United States. But the fact that the statute restricts the possible parties to the proceeding operates in no manner to limit the power of Congress to substitute this new remedy for the recovery of taxes collected under the Agricultural Adjustment Act. The precise question was considered in *Burrill* v. *Locomobile Co.*, 258 U. S. 34, where this Court considered, against objections based on the due process clause, a Massachusetts statute (Laws 1909, c. 490, Sec. 70) substituting a petition in the Supreme Judicial Court, with notice to designated state officers, in the place of a suit against the collector for the refund of taxes illegally collected from corporations.[15] See also *Southern*

[15] In the *Locomobile Co.* case the modification had been made before the taxes were paid, but the Court placed no reliance on this circumstance. In the *Southern Ry.* case the modification was made after the taxes were paid.

Ry. Co. v. *Query*, 21 F. (2d) 333, 346 (E. D. S. C.). The rule has been applied in numerous analogous situations. Stockholders' liability may be made enforcible by a receiver in place of creditors,[16] a state official may be given the exclusive power to institute receivership proceedings,[17] and various types of associations may be authorized to represent its members.[18] Government officials may be given sole power to act for private defendants or plaintiffs,[19] and administrators may be given the sole power to sue on probate bonds or to defend against foreclosure.[20] It is plain that the power of Congress to substitute a new remedy is in no manner limited by the fact that the nominal parties defendant may be different as a result of the fact that the collector may no longer be brought into court.[21]

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[16] *Henley* v. *Myers*, 215 U. S. 373; *Cowden* v. *Williams*, 32 Ariz. 407; see also *Pittsburg Steel Co.* v. *Baltimore Society*, 226 U. S. 455.

[17] *Pennsylvania* v. *Williams*, 294 U. S. 176, 186; *Grimes* v. *Central Life Ins. Co.*, 172 Ky. 18.

[18] *New Orleans Debenture Co.* v. *Louisiana*, 180 U. S. 320; *American Ry. Express Co.* v. *Asher*, 218 Ky. 172; *Grand International* v. *Green*, 210 Ala. 496, appeal dismissed, 265 U. S. 576; see also *Crawford* v. *Branch Bank of Mobile*, 7 How. 279.

[19] *Hines* v. *Collins*, 227 S. W. 332 (Tex.); *Montel & Co.* v. *Consolidated Coal Co.*, 39 Md. 164; *Gilpatric* v. *National Surety Co.*, 95 Conn. 10.

[20] *McCanghey* v. *Lyall*, 224 U. S. 558, 563; *Hayes* v. *Briggs*, 106 Me. 423.

[21] *International Steel Co.* v. *Surety Co.*, 297 U. S. 657, relied upon by petitioner (Br. 28), in no manner contra-

3. We have already demonstrated that petitioner's asserted cause of action is not one based on the common law (*supra,* pp. 35–57). But even if it were, there is no magic which inheres in a common law action and places it beyond the power of the legislature to control or abolish. The general power of the legislature to modify or abolish common law actions must be taken to be beyond question.[22] It has frequently been upheld by this Court. Thus, shippers who have been forced to pay an unreasonable rate were validly forced to go before the Interstate Commerce Commission instead of pursuing their common law right of action. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426. The railway postal clerk can by statute be forced to assume the status of a railroad employee in the place of his common law status as a passenger. *Price* v. *Pennsylvania R. Co.,* 113 U. S. 218; *Martin* v. *Pittsburg & Lake Erie R. Co.,* 203 U. S. 284. The state legislature may validly abolish all liability for torts committed

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dicts this principle; there a different obligation of a different party, substituted for a surety bond, was held to offend against the contracts clause, since it destroyed the right rather than merely changed the remedy.

[22] See, for example: the abolition of the action of detinue, *Troy Laundry Machinery Co.* v. *Carbon City Laundry Co.,* 27 N. M. 117; limitation of suits for trespass by animals, *Burnett* v. *Myers,* 42 S. D. 233, or for the recovery of usurious interest paid, *Crosby* v. *Bennett,* 7 Metc. 17; and the abolition of the liability of toll road proprietors toward the general public. *Williams* v. *Hingham &c. Corp.,* 4 *Pick.* 341.

in the course of the Civil War. *Freeland* v. *Williams,* 131 U. S. 405; *Louisiana* v. *Mayor of New Orleans,* 109 U. S. 285. Bank debtors may be subjected to summary judgment and attachment. *Bank of Columbia* v. *Okely,* 4 Wheat. 235, 245. The common law rights of the injured servant and his master have been subjected to a sweeping statutory modification, always with an elimination of certain of the employer's defenses and generally with a substitution of administrative for judicial proceedings. *New York Central R. Co.* v. *White,* 243 U. S. 188; *Hawkins* v. *Bleakly,* 243 U. S. 210; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Ward & Gow* v. *Krinsky,* 259 U. S. 503; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *Arizona Copper Co.* v. *Hammer,* 250 U. S. 400; *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. 594; *Crowell* v. *Benson,* 285 U. S. 22.

4. We take it, then, as settled that the legislature has full power to substitute one remedy for another, even though the parties may be different and even though the new action be a statutory substitute, whether administrative or judicial, for a common law cause of action. Petitioner's argument to the contrary takes the form of two propositions, neither of which we deny.

First. It is urged (Br. 13–14) that a vested right of action is property which cannot be destroyed or arbitrarily interfered with by the legislature. *Pritchard* v. *Norton,* 106 U. S. 124, 132; *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; *Ettor* v. *Tacoma,*

228 U. S. 148, 156; *Steamship Company* v. *Joliffe*, 2 Wall. 450, 457; *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338; *Coombes* v. *Getz*, 285 U. S. 434. We have no desire to quarrel with this principle. We assert only that a property right of this nature has no special immunity to legislative regulation, and that its enforcement may be accomplished by whatever remedy the legislature provides. If the new remedy gives to the petitioner all that the Constitution requires, it cannot complain that it was initiated after his right arose. As this Court said in *Gibbes* v. *Zimmerman*, *supra*, 332:

> The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (*Pritchard* v. *Norton*, 106 U. S. 124, 132), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393; *Backus* v. *Fort St. Union Depot Co.*, 169 U. S. 557, 571; *Crane* v. *Hahlo*, 258 U. S. 142, 147; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden Co.* 284 U. S. 151, 158.

Petitioner (Br. 14) relies on three state cases to support a proposition that there is a vested right to the measure of damages authorized when the cause of action arose. *Kay* v. *Pennsylvania R. Co.*, 65 Pa. 269, 277; *Lewis* v. *Pennsylvania R. Co.*, 220 Pa. 317; *Preveslin* v. *Derby & Ansonia Developing Co.*, 112 Conn. 129. Each case relates to a retroactive imposition or modification of arbitrary limits upon specified types of tort liability after action was begun. They have no bearing on the present problem and are, moreover, inconsistent with cases such as *Home B. & L. Assn.* v. *Blaisdell*, 290 U. S. 398; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240.

Second. Petitioner also insists (Br. 15–18) that the legislature cannot constitutionally destroy a right under the guise of regulating a remedy. *Ettor* v. *Tacoma*, 228 U. S. 148, 155; *Truax* v. *Corrigan*, 257 U. S. 312; *Brinkerhoff-Faris Co.* v. *Hills*, 281 U. S. 673, 679; *McGahey* v. *Virginia*, 135 U. S. 662. Here, again, we have no disposition to question this doctrine. But the right to which the doctrine has reference is one protected by the Constitution. If petitioner has left unimpaired all that the Constitution assures to him he cannot object that modifications in procedure have impaired expectations which are not protected by the Constitution. In other words, these cases are themselves authority for our position that the inquiry must be directed at the right remaining to petitioner; if it is ade-

quate the Constitution contains no prohibition against modification of the earlier remedy.

5. We have so far discussed the question without reliance on the fact that Congress has substituted this new remedy, not in controversies between private citizens, but with respect to controversies between the Government and its taxpayers. In regard to such controversies the power of Congress to substitute one remedy for another is even broader than would otherwise be the case.

First. The system of tax collection and refunds is the artery of the Government which carries its life-blood. The necessities of securing prompt collection and minimizing the burden of the procedure of tax refunds makes a wide Congressional control indispensable. See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 282. In consequence it has long been settled law, as this Court, in *The Collector* v. *Hubbard*, 12 Wall. 1, said (p. 14):

> Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation.

This principle, that Congress has complete control over the remedies open to taxpayers, is still accepted by this Court. In *Ex parte Bakelite*

Corp., 279 U. S. 438, 451, and again in *Crowell* v. *Benson*, 285 U. S. 22, 50, it was said:

> Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

Given a power so complete, it is impossible that a taxpayer could assert a vested right in whatever procedure happened to apply when his claim accrued, or preclude legislative revision of the remedies open to taxpayers who had overpaid their taxes.

Second. The suit for the refund of taxes is essentially one which is brought against the United States, even though the Collector be the nominal party defendant. Thus, in *Curtis's Administratrix* v. *Fiedler*, 2 Black, 461, 479, it was said that "the right of action given is in its nature a remedy against the Government." In *Philadelphia* v. *Collector*, 5 Wall. 720, 733, the Court said that "a judgment against the collector in such a case is in the nature of a recovery against the United States." In speaking of the suit against the collector, the Court in *Nichols* v. *United States*, 7 Wall. 122, 127, after pointing out the sovereign

immunity to suit, said that "the allowing of a suit at all, was an act of beneficence on the part of the government." In *The Collector* v. *Hubbard*, 12 Wall. 1, 14, the Court stated that the remedies for the recovery of taxes "may be withdrawn altogether at the pleasure of the law-maker." In *Auffmordt* v. *Hedden*, 137 U. S. 310, 329, the Court said that "the action is, to all intents and purposes, with the provisions for refunding the money if the importer is successful in the suit, an action against the government for moneys in the Treasury." The *Auffmordt* case, with other tax cases, was cited by this Court in *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, to establish the proposition that tax controversies were completely within the control of Congress, and this statement was repeated in *Crowell* v. *Benson*, 285 U. S. 22, 50–51. Finally, in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383, this Court said:

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. *Philadelphia* v. *Collector, supra*, p. 731. There may have been utility in such procedural devices in days when the Government was not suable as freely as now.

> *United States* v. *Emery, supra; Ex parte Bakelite Corp.*, 279 U. S. 438, 452; Act of February 24, 1855, c. 122, 10 Stat. 612, Secs. 1 and 9; Judicial Code, Sec. 145; 28 U. S. C., Sec. 250; Judicial Code, Sec. 24 (20); 28 U. S. C., Sec. 41 (20). They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics added.]

The history of the customs administration would seem to preclude any doubt as to the power of Congress to withdraw suit against the Collector.[23] Not since 1890 (sec. 25, c. 407, 26 Stat. 131) has it been possible to sue the collector for duties erroneously assessed on imports; the United States has been made the sole party defendant. *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693–695; *United States* v. *Passavant,* 169 U. S. 16, 21; *Ex parte Bakelite Corp.,* 279 U. S. 438, 451–452, 458; *United States* v. *Stone & Downer Co.,* 274 U. S. 225, 232–233.

It is true that there are a number of decisions of this Court which speak of the action against the Collector as "personal." *Patton* v. *Brady,*

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[23] While import duties are imposed by virtue of the power to regulate foreign commerce as well as the taxing power, *Board of Trustees* v. *United States*, 289 U. S. 48, this, even if the duties were not taxes, has no bearing whatever on the status of the Collector.

184 U. S. 608, 612–615; *Sage* v. *United States,* 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4–5; *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308, 312. But as we have pointed out (*supra,* pp. 40–42), these cases merely deal with the procedural consequences of the form in which Congress has chosen to allow suit against the Government, and the Court naturally adopted terminology appropriate to that question. It is also true that *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429–430, contains a dictum to the effect that since the action against the Collector is personal it cannot be withdrawn unless there remains one against the Government; but even this rule has been met by Title VII. It is, in any event, controlled by the later decisions of this Court. In *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, 627, this Court held that a judgment against the Commissioner or against the United States raised an estoppel against the Collector. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, held that a retroactive imposition of liability upon the Collector was not unconstitutional because the Government was the real defendant. Neither of these decisions could have been made except on the premise that the suit against the Collector is in reality one against the Government.[24]

[24] It is a matter of some significance that three of the District Courts which have sustained Title VII have done so because the suit against the Collector may be withdrawn in exercise of the sovereign immunity to suit. *Butler* v. *Carney,* 17 F. Supp. 138, 140 (D. Mass.); *Cudahy Co.* v.

Indeed, we do not believe that it can seriously be doubted that the petitioner does not hope to recover over $300,000 (R. 8, 14) from the respondent personally, or that the Collectors as a class could repay the $963,000,000 (*infra*, p. 82) which was collected and paid into the Treasury under the Agricultural Adjustment Act. As this Court has on occasion stated, it cannot shut its eyes "to what all others than we can see and understand." *United States* v. *Butler*, 297 U. S. 1, 61; *Child Labor Tax Case*, 259 U. S. 20, 37.

We wish to make emphatically clear that this case does not require a decision as to the power of Congress to withdraw suit entirely, both against the Collector and against the Government. For Congress has left a remedy against the Government which is fair and adequate in every respect.[25] There is, accordingly, nothing in our position which is inconsistent with the statement in *Graham & Foster* v. *Goodcell, supra*, 429–430. We urge the essential identity of the suit against the Collector and that against the United States only to demon-

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Harrison, (N. D. Ill.), decided February 9, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9450; *Wilkes-Barre Lace Co.* v. *Mundy*, (M. D. Pa.), decided January 28, 1937, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9405.

[25] The cases holding that it is a denial of due process for a state to enact taxes without providing some remedy for their recovery in the event of their illegality are thus irrelevant. See *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17.

strate the want of merit in petitioner's contentions that the remedy given to him at the time his claim for refund arose must be taken to be beyond Congressional control.

Third. If there were any doubt as to the application of this principle, it would be removed by the decisions in which this Court has applied a statutory modification of the taxpayers' remedy to a cause of action which had accrued before its enactment. In *Curtis's Administratrix* v. *Fiedler,* 2 Black 461, 479–480, the court indicated that an action against the Collector could, if protest were properly made, be maintained under the Act of 1845 even though the Collector was, under *Cary* v. *Curtis,* 3 How. 236, not liable at the time of importation.[26] In *The Collector* v. *Hubbard,* 12 Wall. 1, 13–16, because "a party cannot have any vested right in a remedy conferred by an Act of Congress," the court held constitutional a statute, enacted after payment of the tax, requiring appeal to the Commissioner before commencing suit against the Collector. In *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 401–402 (the opinion also covers cases in which the Collector was a defendant), the Court sustained an Act of Congress preventing recovery by taxpayers of certain

[26] In this paragraph we assume that the Court does not agree that the suit against the Collector is the equivalent of one against the United States. By this view, since the action is one personal to the Collector, his rights are entitled to the same protection as those of the taxpayer.

excise taxes which had previously been paid and claim for refund denied unless they showed, in substance, that they had borne the burden of the tax. In *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 380–383, this Court sustained a statute which retroactively made the Collector liable for the recovery of taxes which had not been protested.[27]

Finally, we believe that *Burrill* v. *Locomobile Co.,* 258 U. S. 34, forecloses any contention that Congress is unable to substitute a remedy against the United States for one against the Collector after the taxpayer's cause of action has accrued. The plaintiff, on the theory that the taxes were held unconstitutional by this Court in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, brought suit against the Collector. This Court accepted the defense that the Collector's liability had been removed and a remedy against the State, by petition in the Supreme Judicial Court, substituted. While the changed procedure was enacted prior to payment of the taxes, the reasoning of this Court seems fully applicable to the questions presented by Title VII of the Revenue Act of 1936. It said (pp. 38, 39):

> It is true that it cannot constitutionally impose certain taxes upon foreign corporations, but if the law of the United States stops there we do not perceive why the State may not provide that only the author of the wrong shall be liable for it, at least when, as

[27] See footnote 26, *supra.*

> here, the remedy offered is adequate and backed by the responsibility of the State. That it may do so is implied in *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269, 274.
>
> The Constitution standing alone without more does not create a paramount unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates. It leaves the remedies to Congress and the States.
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> * * * * *
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> But the common law of Massachusetts is not superior to its statutes and may be modified by them at the pleasure of the State, at least until in some substantial sense it impairs substantive constitutional rights, which it has not attempted to do.

Accordingly, we submit that the settled principles of constitutional law permit the Congress to substitute a new remedy for the recovery of taxes in place of those existing when the taxpayer's claim accrued. Any other rule would constitute a grave and a recurrent threat to the orderly administration of the revenue laws.

6. We do not, of course, argue that the power to substitute new remedies may be exercised in a manner such as to work oppression and injustice upon the taxpayer. If the new remedy itself be so plainly arbitrary and oppressive that it must fall under the due process clause it gains no immunity because it is substituted for an old remedy. But, as we read the decisions of this Court and the

dictates of constitutional government, no taxpayer can complain of an adequate and just remedy for the recovery of taxes merely because it was not in existence at the time his taxes were paid or his suit was instituted. The provisions of Title VII must, therefore, be judged in their own right. If, under their terms, substantial justice is done the taxpayer no complaint can be made because they were enacted after payment of the taxes. If there can be no vested right in any particular method of refunding taxes, a method which does substantial justice and leaves untouched all rights protected by the Constitution cannot be attacked on the ground that it is a change from the older procedure.

V

The Constitutionality of Title VII: Introductory Discussion

The following portions of the brief have no bearing on the decision of this case if the Government should prevail in its arguments that the District Court was without jurisdiction, whatever the nature of the remedy provided by Title VII. They are also immaterial if the implications in petitioner's argument should be adopted to the effect that Congress has no power under any circumstances to change the taxpayer's remedy after his cause of action accrued.

We are confident that the removal of jurisdiction prevents any examination of the constitutionality of Sections 902, 906, and 907 by this Court in this case. Our discussion of these problems is in part an excess of caution. It represents also a desire to make perfectly plain that Congress has not exercised its control over the jurisdiction of the inferior Federal courts in an arbitrary fashion or in a manner such as to work an injustice upon the taxpayers.

The discussion of the particular provisions of Title VII cannot, however, appropriately be commenced without consideration of the economic and fiscal background out of which it grew. It is also desirable to indicate the precise scope of the issues which we believe to be capable of decision in this case, if the Court should consider the constitutionality of Sections 902, 906, and 907 to be in issue at all.

1. THE ECONOMIC AND FISCAL BACKGROUND

The Agricultural Adjustment Act was originally enacted on May 12, 1933. Under its authority taxes were imposed on the processing of a rather wide variety of basic commodities.[28] These com-

[28] Taxes collected under the Agricultural Adjustment Act. The total of $963,229,196.64 does not include the $237,000.00 of taxes estimated to have been unpaid on Jan-

modities embrace the great bulk of the nation's agricultural products. Their processing requires about 20 per cent of the factory activity of the nation.[29] In the form of foodstuffs, textiles, and tobacco products they are bought by every consumer in the country. Moreover, the taxes imposed under the Act were relatively heavy. They amounted from about 10 to 57 per cent of the average market price of the raw commodity just prior to their inception; on the great commodities of wheat, cotton, and hogs (at the maximum rate) the tax was more than 50 per cent.[30]

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uary 6, 1936 (see Hearings on H. R. 12395, Senate Committee on Finance, 74th Cong., 2d Sess., p. 2).

Information compiled from Annual Reports, Commissioner of Internal Revenue: 1934, pp. 70–77; 1935, pp. 74–81; 1936, pp. 84–91.

Commodity	First effective date of tax	Total amount collected
Hogs	Nov. 5, 1933	$270,608,703.86
Wheat	July 9, 1933	250,923,623.49
Cotton	Aug. 1, 1933	246,081,073.65
Sugar	June 8, 1934	101,621,986.08
Tobacco	Oct. 1, 1933	64,039,054.80
Paper and jute	Dec. 1, 1933	13,103,803.90
Corn	Nov. 5, 1933	12,270,646.92
Peanuts	Oct. 1, 1934	3,709,987.05
Rice	Apr. 1, 1935	694,841.01
Rye	Sept. 1, 1935	175,475.88
Total		963,229,196.64

[29] Computed from the weights applied in the Federal Reserve Board Index of Factory Production (see the Federal Reserve Bulletin, February 1927, vol. 13, pp. 102–103) and the Biennial Census of Manufactures, 1931, pp. 1, 5, 8, 9, 12.

[30] Percent of average price of raw commodities, during the six months (or the full crop year in the case of rice and tobacco) prior to imposition of tax, which was repre-

More than two and one-half years after their enactment the taxes imposed under the Agricultural Adjustment Act were on January 6, 1936, declared invalid by this Court. *United States* v. *Butler,* 297 U. S. 1. During this long period almost a billion dollars of these taxes had been collected. It was inevitable that the processing taxes should have compelled a readjustment of the marketing processes and relationships attending the distribution of agricultural products. We submit that the nation's economy had so adjusted itself that for the overwhelming majority of processors the tax was no more of a burden than any other normal cost of operation.

We know of no economist who would deny the inevitability of these readjustments. The tax applied to every unit which was processed or sold and was applicable indifferently to every competitor. There was thus no opportunity (as, for example, in the case of a State tax) for a competitor in one State to undersell another in a different State who

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sented by the maximum processing tax under the Agricultural Adjustment Act. Data from monthly farm price statistics, published by Bureau of Agricultural Economics, Department of Agriculture.

	Percent
Rye	57
Rice	55
Wheat	53
Hogs	52
Cotton	51
Peanuts	38
Tobacco	35
Sugar	16
Corn	11

is more heavily taxed and thus prevent the latter from recouping the amount of the tax. Accordingly, it is universally agreed that the normal tendency is for the burden of such a tax to be shifted to another than the one who nominally pays it.[31] It may ordinarily be assumed that the tax will be shifted through increasing the price of the finished article, although in certain markets it may be shifted back to the producer or grower of the raw commodity.[32] But whatever the ultimate incidence, no economist has supposed that it would rest on the manufacturer or processor who nominally pays it. This much petitioner concedes to be generally true (Br. 31).

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[31] See, *e. g.*, Mill, *Principles of Political Economy*, p. 436; Seligman, *Incidence of Taxation*, pp. 23, 30–62, 77–78, 217–254, 339–355; and *Studies in Public Finance*, p. 136; Bastable, *Public Finance*, p. 367; Lutz, *Public Finance*, Chapter XVIII; Taussig, *Principles of Economics* (3rd Ed.), Vol. II, Chapter 71; Adams, *Science of Finance*, pp. 383–393; Brown, *Economics of Taxation*, Chapters III and IV; Green, *Theory and Practice of Modern Taxation*, pp. 130–132; Burton, *The Sales Tax* (10th Ed.); Silverman, *Taxation*, p. 110; Report of Committee on National Debt and Taxation, London, 1927, pp. 209, 372; Armitage-Smith, *Principles and Methods of Taxation*, pp. 61–62.

[32] Bastable, *supra*, note 25, p. 372; Lutz, *supra*, n. 25, p. 387; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, opinion of Mr. Justice Stone, p. 581. This seems to have been the case with respect to the processing tax on hogs. See Hearings before Senate Committee on Agriculture and Forestry on S. 1807, 74th Cong., 1st Sess., pp. 183, 185; Hearings before House Committee on Agriculture on H. R. 6133, 73d Cong., 2d Sess., p. 153; *Swift & Co. Yearbook*, 1934, pp. 16–17.

It is abundantly plain that Congress recognized this principle in the enactment of the Agricultural Adjustment Act and that it recognized the premise upon which it rested. For it took extraordinary pains to insure that no competitor of the processor would gain an undue advantage over him because of the tax. Floor stocks taxes were imposed on processed goods on hand upon the initiation or increase in rate of any processing tax (Secs. 15, 16); a compensating tax, equivalent to the processing tax and in addition to the regular tariff, was imposed on imported articles (Sec. 15 (e)); and provision was made for processing taxes to be imposed upon competing commodities (Sec. 15 (d)). Thus there was expected to be no tax-free competitor to prevent shifting the burden of the tax.

It is also evident that Congress assumed that this would result in shifting the burden of the processing tax to the consumer in domestic markets. Thus, a refund of the tax was authorized in the case of articles exported to foreign markets, where untaxed competitors would be expected to prevent recoupment from consumers (Sec. 17 (a)). In the case of processing under contracts executed prior to the initiation of the tax, the purchaser was required either to pay the tax or to make satisfactory adjustment with the processor (Sec. 18). Deliveries to charitable and other institutions which Congress did not desire to burden entitled the seller

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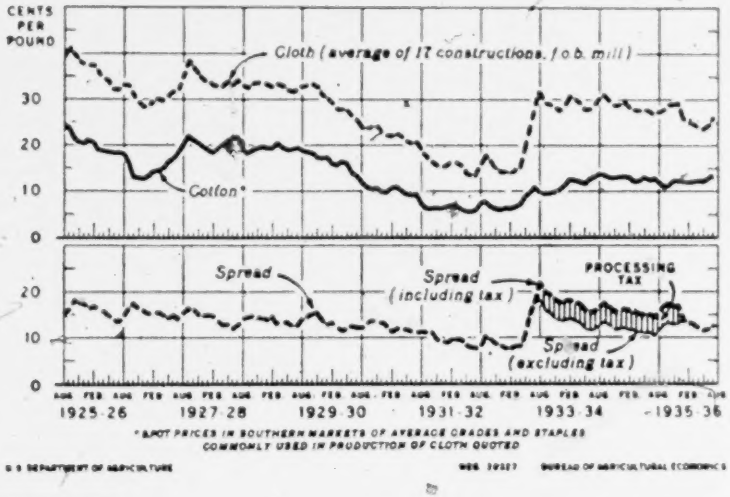
to a refund on showing that the institution had not borne the burden of the tax (Sec. 15 (c)).

The subsequent history of the Agricultural Adjustment Act demonstrates that in fact the processor was substantially unaffected by the tax. For the purposes of simplicity we shall confine our discussion to the tax on cotton.[83]

There is reproduced below a chart [84] which gives graphic evidence that the cotton processor suffered

PRICE OF RAW COTTON AND OF ESTIMATED GRAY CLOTH OBTAINABLE, AND SPREAD BETWEEN THESE PRICES, AUG. 1925-JULY 1936



[83] Two charts are reproduced in Appendix B, *infra*, pp. 188–189, which give a summary picture of the situation with respect to the taxes on the other two great commodities, wheat and hogs. In each case the processing margin increased by enough to reimburse the processor for the amount of the tax and in each case the margin declined by a substantially equivalent amount after termination of the tax.

[84] The chart was introduced by Secretary Wallace in the hearings on the Revenue Act of 1936 and is found at p. 866 of Hearings before Senate Committee on Finance on H. R. 12395. It is based on data gathered by the Bureau of Agricultural Economics.

no loss because of the imposition of the tax. The upper part of the chart shows the prices of raw cotton and of cotton goods over a ten-year period. The imposition of the processing tax on August 1, 1933, had no effect upon the price of raw cotton but was accompanied by an abrupt increase in the price of finished cotton. This increase apparently is in part due to the tax (since the price rise continued during August) and in larger part to the feverish activity in anticipation of the adoption of the N. R. A. Code, which became effective for the textile industry two weeks earlier. The picture at this time is thus not very clear, but no such complication was present when the tax was terminated on January 6, 1936, and the decline in the price of cloth, while cotton prices remained stable, can be traced only to the termination of the processing tax. The lower portion of the chart plots the spread or margin between the price of raw cotton and the selling price of the finished cloth; it thus shows the gross income realized by the processor. The shaded portion indicates the amount of the processing tax. It may readily be seen that the tax was reflected in an increased margin and that its termination brought a prompt reduction in the size of this margin.

The actual figures show an even more striking precision in the correlation between the termination of the tax and the reduction in the price of cotton cloth. The following table (Report of Agricultural Adjustment Administration, 1933 to 1935, p. 143) shows an almost exact correspondence be-

tween the amount of the processing tax, averaging 4.52 cents per pound of finished cloth, and the reduction in price of cotton cloth, avering 4.70 cents per pound after termination of the tax.

Comparative prices of 28 constructions of cotton goods as of January 4 and January 31, 1936

Type of cotton goods	Average prices Jan. 4, 1936	Average prices Jan. 31, 1936	Decline
	Cents per pound	*Cents per pound*	*Cents per pound*
10 print cloths	34.91	30.31	4.60
2 osnaburgs	26.35	21.66	4.69
3 carded broadcloths	36.55	32.47	4.08
13 sheetings	30.37	25.45	4.92
Average	32.37	27.67	4.70

The cotton processors themselves have repeatedly testified, by action and by word, that the burden of the Agricultural Adjustment Act taxes was being passed on to their customers. When they exported or sold to charities they reduced their prices and obtained refunds from the Commissioner.[85] They secured the imposition of a tax on paper and jute under Section 15 (d) of the Act on the ground that their competition resulted in "excessive shifts in consumption" from cotton to paper and jute.[86] Price quotations in the trade publications were

[85] Charitable refunds of $2,385,897.65, and export refunds of $5,326,760.82 were made on cotton goods up to Dec. 31, 1935. *Report of Agricultural Adjustment*, 1933 to 1935, p. 294.

[86] Compensatory taxes on the manufacture of certain paper and jute products were imposed from December 1, 1933, to Jan. 6, 1936. See *Report of Agricultural Adjustment*, 1933 to 1935, p. 141.

made on a "tax included" basis.[37] Beginning in August 1935 (the cotton mills had commonly ceased paying the processing tax by May 1935), the mills sold cloth under contracts containing a standard tax clause which provided for a refund to the vendee if the processor was relieved of liability for the tax.[38] This was done because of the "wide-

[37] See the Daily News Record. Beginning on the day of the inception of the tax on August 1, 1933, the prices are catalogued either "processing tax to be added" or "tax included." By September 6, 1933, all prices contained the latter notation.

[38] Hearings before Senate Committee on Finance on H. R. 12395, 74th Cong., 2d Sess., p. 300. The clause may be found in the Daily News Record, August 8, 1935, and reads as follows:

"If and when, for any reason, seller's liability for processing taxes levied under the Agricultural Adjustment Act, as heretofore and hereafter amended, is increased, decreased, or terminated, or such taxes shall be invalidated by final decision of the Supreme Court of the United States, prices on any uninvoiced portion of this contract are subject to adjustment at a rate computed on the basis of the conversion factors set up by the Treasury Decision 4433, approved May 10, 1934.

"In addition, the seller will credit on the buyer's account the amount, computed on the basis of such conversion factors, of any such tax, which, by reason of such invalidity, shall have been refunded to the seller or seller shall have been relieved from paying, with respect to any portion of this contract as to which title has passed within —— days prior to such determination of invalidity. The title shall be deemed to have passed when goods are invoiced. No such credit shall be allowed hereunder in respect of any portion of this contract upon which a direct refund from the

spread suspension of buying in the cotton-goods field" as a result of the purchasers' fear of being forced to sell tax-paid goods in competition with goods manufactured after a possible termination of the tax.[39] Mr. G. H. Dorr, Chairman of the Board of Directors of the Cotton Textile Institute, testified that the tax was an element of cost having an inevitable and immediate effect upon the market price.[40] The trade publications of the cotton textile industry repeatedly recognized that the burden of the processing tax ultimately fell on the consumer.[41]

Further evidence seems unnecessary that, as a general rule, the cotton processor did not bear the economic burden of the tax but passed it on in the form of higher prices which ultimately rested on the consumer. Petitioner at no place in his brief argues to the contrary.

Government on floor stock is recoverable by the buyer or any subsequent holder.

"In any settlement hereunder, seller shall be entitled to deduct on a pro rata basis reasonable expenses of procuring any such refund or relief."

[39] Testimony of Mr. Flint Garrison, representing the Wholesale Dry Goods Institute. Hearings before Senate Committee on Finance on H. R. 12395, 74th Cong., 2d Sess., pp. 300–301.

[40] Hearings, *supra*, n. 38, pp. 374–375.

[41] See, for example, Merritt, *Analysis of Processing Tax*, Cotton Digest, April 27, 1935, pp. 11–12; McCampbell, *Mills Were the Victims not the Beneficiaries of the "Greatest Steal"*, Daily News Record, March 30, 1936; Veit, *The Convertor's Viewpoint*, Daily News Record, April 22, 1936; *Statement of Cotton Textile Institute and Cotton Textile Code Authority*, Daily News Record, May 4, 1935.

Accordingly, the Agricultural Adjustment Act had resulted in the collection of over $963,000,000 in taxes from taxpayers who, as a general rule, did not bear the economic burden of these taxes. The decision of this Court in *United States* v. *Butler*, 297 U. S. 1, thus raised a problem of tax refunds which, in the magnitude of the sums involved and in the number and conflicting equities of the persons affected, was without precedent in the history of any nation.

In this situation there seem to have been only four alternatives among which Congress could choose.

First. The Congress could have viewed the taxes collected under the Agricultural Adjustment Act as on the same footing as any illegal collection from an individual taxpayer, and accordingly permit a full refund upon mere proof of payment. This, we submit, would be a solution which no government could with conscience adopt. The processors as a rule had not borne the burden of the tax. To repay almost a billion dollars to them merely because the mechanism of tax collection resulted in their having the nominal status of a taxpayer would generally be the equivalent of presenting to the processor a gratuity of unprecedented size. For example, the total of taxes collected on wheat processing is 7.4 times the average annual earnings of that industry during the prosperous years 1927–1929, those on cotton processing were 6.8 times the earnings for that industry, and

those on hog processing were 20.8 times the earnings for that industry."[42] These large sums would be paid to processors who probably had not been harmed in any way by the processing tax.[43] The money would, of course, sooner or later have to be raised by taxation. Certainly, no nation would consciously choose to tax the multitudes who bore the burden of the Agricultural Adjustment Act taxes for the benefit of those who did not.

Second. The Congress could have adopted a rough generalization and assumed that in every case the consumer had ultimately borne the burden of the tax.[44] On this assumption principles of jus-

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[42] Ferger, *Windfall Tax and Processing Tax Refund Provisions*, 27 American Economic Review, 45, 50, contains the data for the average annual net profits; they are computed from data published by the Bureau of Internal Revenue. The amount of taxes collected is shown in footnote 28, *supra*, p. —.

[43] Petitioner's argument (Br. 58–61) that the higher prices meant lowered volume of sales ignores the unquestioned fact that the general purchasing power was increased by the operation of the Act. While other factors, of course, contributed, it is significant that the average mill consumption of cotton averaged 458,000 running bales per month in the two years prior to the imposition of the tax, and 465,000 running bales per month during the tax period. See *infra*, pp. 155–158. (The earlier period includes the feverish activity in anticipation of the N. R. A. Code.) Data compiled from *Cotton Production and Distribution*, periodically published by Bureau of Census, Department of Commerce.

[44] This would probably be accurate in the majority of cases. In the hog industry it would, however, be roughly accurate to assume that the burden was borne by the farmer. See footnote 32, *supra*, p. 84.

tice might indicate that the tax refund should be made to the consumer. The conclusive answer to this suggestion was the complete impossibility of determining, from possibly 100,000,000 consumers, either the particular consumer or the amount of the tax burden which he bore.

Third. The Congress could have refused to make any refund of the taxes, by directing the Commissioner to make no refunds and, by virtue of the sovereign immunity, barring suit both against the United States and the Collector (see *supra,* pp. 72–78). This solution would achieve a certain rough justice. Its adoption would make unnecessary the imposition of additional taxes up to the amount of about one billion dollars and would thus benefit each of the many citizens who would have to pay the resulting increase in taxes. The taxpayers, as a class, come more closely than any other to being representative of the consumers as a class, who actually bore the burden of the tax. The great majority of the taxpayers under the Agricultural Adjustment Act may be assumed not to have borne the burden of the tax themselves, and would be subjected to no injustice were recovery denied to them.

The legislative history of the 1935 amendments to the Agricultural Adjustment Act (c. 641, 49 Stat. 768) make clear the fact that Congress would have chosen this solution in preference to allowing refund upon mere proof of payment. The amendment passed the House in a form which provided

in Section 21 (a) that no refund whatever should be made of Agricultural Adjustment Act taxes collected prior to adoption of the amendment, except where clerical errors were involved. Members of the House of Representatives considered such a provision "entirely justified." 79 Cong. Rec. 9560. The Senate committee on Agriculture and Forestry reported the bill favorably with Section 21 (a) in the form adopted by the House.[45] In the debates on the floor, the Senators were divided between those who believed the solution provided by Section 21 (a) to be fully appropriate, in view of the fact that the consumer had borne the burden of the processing tax,[46] and those who felt that justice required that provision be made for refund to the occasional processor who had himself borne the burden of the tax.[47] As a result, the Senate provided that Section 21 (d), originally applicable solely to taxes collected after adoption of the amendment, should also cover taxes theretofore paid.[48] Under Section 21 (d) the taxpayer could recover taxes collected under the Agricultural Adjustment Act if he were able to show that he had borne the burden of the tax. The Congress appeared to have been unanimously of the

[45] Senate Report 1011, 74th Cong., 1st Sess., pp. 3, 22–23.

[46] See 79 Cong. Rec., pp. 11018–11021, 11388–11390, 11447–11451.

[47] See 79 Cong. Rec., pp. 11388–11390, 11451.

[48] See 79 Cong. Rec., p. 10932.

view that the law as thus modified represented the closest possible approximation of justice."

The general principle embodied in Section 21 (d) was continued in Title VII of the Revenue Act of 1936, with important changes designed to clarify both the substance and the administration of the refunds of Agricultural Adjustment Act taxes. The principle constitutes the fourth alternative which Congress could have adopted and consists in providing for refund of the taxes to the extent, and only to the extent, that the processor actually bore the burden of the taxes. We submit that a government could do nothing else if it were anxious, on the one hand, that its citizens should not be taxed in order to confer an unwarranted benefit upon a few persons and, at the same time, solicitous to avoid injustice in the cases where the nominal taxpayer had actually borne the burdent of the tax. The basic principle was accepted by the Congress without question from any source, and was discussed chiefly with reference to Title III of the Revenue Act, providing for a tax upon unjust enrichment resulting from non-payment of Federal excise taxes.[50] By limiting refunds to those who actually bore the economic burden of the tax, no injustice is done the processor. He can ask for a larger recovery only on an admission that he

[49] See 79 Cong. Rec., pp. 9586, 10932, 11017–11021, 11376, 11388–11390, 11451, 11462, 11643, 13021.

[50] But see 80 Cong. Rec. 8652.

seeks not the remedy of a wrong but an unjust enrichment of staggering proportions. As Judge Wilkerson said in *Cudahy Packing Co.* v. *Harrison* (N. D. Ill.), decided February 9, 1937, not yet reported but found in 1937 C. C. H., vol. 3, pp. 9450, 9453:

> In enacting the legislation of 1936 Congress was attempting to prevent the perpetration of a great wrong, if not a downright fraud. It was not to be tolerated that a taxpayer who had not borne the burden of the taxes but had so conducted his business that the money with which the tax was paid was actually contributed by others, should take out of the public Treasury for his own benefit the amount of the tax.

Title VII seeks to avoid any such result and at the same time to avoid injustice to the processor who was in fact affected by the imposition of the tax.

We do not see how any one can quarrel with the general principle of Title VII. Given a situation where it is impossible to make refund to the consumer who, as a general rule, was the one actually injured by the tax, Congress has made the closest possible approximation to absolute justice. The taxpayers of the nation are all consumers, and most of the consumers are taxpayers. To relieve the taxpayer of an unwarranted burden is the rough equivalent of benefiting the consumer. At the same time Congress has sought to protect the Agricultural Adjustment Act processor to the extent

that he actually bore the burden of the tax. We submit not only that Congress has fulfilled every obligation of a Government anxious to deal fairly with its citizens but that no other course could in good conscience have been adopted.

2. THE QUESTIONS OPEN TO DECISION IN THIS CASE

Petitioner urges a wide variety of objections to the remedies provided Agricultural Adjustment Act taxpayers by Title VII. None is relevant unless this Court should hold that the nature of these remedies must be considered in order to dispose of our contentions as to the power of Congress to control the jurisdiction of the District Court. If this Court should rule that this question cannot be disposed of without some examination of the character of the remedy provided by Title VII, it then becomes necessary to consider which of the constitutional questions raised by petitioner can properly be considered at this time.

Petitioner's argument, as we understand it, is directed at only three sections of Title VII: (1) Section 902, prescribing the substantive restriction that the taxpayer may obtain a refund only to the extent that he establishes that he bore the burden of the tax; (2) Section 906 (b)–(g) establishing the Board of Review and providing for an administrative determination, subject to judicial review, in the case of processing taxes; and (3) Section 907, providing methods by which to determine whether or not the taxpayer bore the burden of the tax.

We do not dispute that, if considered relevant to the disposition of this case, the first two questions may now be considered by this Court. But we emphatically challenge petitioner's belief that this Court can at this time properly consider his objections to Section 907.

Petitioner's arguments which in reality are largely directed against Section 907 may roughly be catalogued as follows: (1) Section 902 is vague and uncertain (Br. 30–34). (2) The burden of proof imposed on the taxpayer by Section 902 is impossible for him to carry (Br. 34–40, 48–50). (3) The presumption that the processing margin is *prima facie* indicative of bearing or shifting the burden of the tax is arbitrary and unconstitutional (Br. 40–48). It will be observed that each of these contentions relates to the manner in which taxpayers will in actual practice be able to show the incidence of the Agricultural Adjustment Act taxes. They do not go to matters appearing on the face of the statute but to questions which can acquire reality only in respect to a taxpayer who has actually tried to show that he bore the burden of the tax.

We submit that this Court cannot properly consider these questions until an actual claim is filed, until the proper administrative officials and experts have acted upon this claim, and until the trained judgment of the Commissioner and the specialized administrative tribunal has been obtained on the question. Petitioner in effect asks

this Court to condemn an Act of Congress in advance of its trial on the ground that its provisions will be difficult or impossible to administer. The request is extraordinary, in that it asks this Court to enter into a speculative and purely abstract inquiry as to the accuracy with which the operation of the statute will reflect the amount of the tax refund to which the petitioner is entitled. This is a question to which there can be no definitive, or even tolerably accurate, answer except in the concrete consideration of a particular case after the claim has been filed and considered by the Commissioner. In place of these indispensable facts, we have only the conjectures of petitioner.

The Federal courts are constitutionally unable to render advisory opinions as to the validity of legislation. *Steamship Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39. The reasons which compel this limitation are, even though there be a case or controversy, fully applicable to preclude speculative attacks upon the future operations of a statute. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 324. The Constitution does not protect the peace of mind of the taxpayer (*Pacific Tel. Co.* v. *Seattle*, 291 U. S. 300, 304), but operates only to protect him from actual as opposed to conjectural injury. A court will not assume to declare an Act of Congress unconstitutional merely because it *might* in the future operate in an arbitrary or capricious manner. As this Court said in *Cincinnati* v. *Vester*, 281 U. S. 439, 448–449: "It is an established prin-

ciple governing the exercise of the jurisdiction of this Court, that it will not decide important constitutional questions unnecessarily or hypothetically." Again, in *Tennessee Publishing Co.* v. *American Bank,* 299 U. S. 18, 22, it said: "It is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it." See also *St. Louis I. M. & S. Ry. Co.* v. *Wynee,* 224 U. S. 354, 360; *Yazoo & Miss. R. R.* v. *Jackson Vinegar Co.,* 226 U. S. 217, 219; *Arizona Employers' Liability Cases,* 250 U. S. 400, 430; *Young Co.* v. *McNeal-Edwards Co.,* 283 U. S. 398, 400; *New Jersey* v. *Sargent,* 269 U. S. 328; *Arizona* v. *California,* 283 U. S. 423.

This Court has recently, in *Borden's Co.* v. *Baldwin,* 293 U. S. 194, 210, pointed out in unmistakable terms the rule which must be followed in deciding a question of constitutionality:[51]

> * * * it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appro-

[51] In the *Borden* case this Court remanded the case for a hearing and findings of facts looking toward a permanent injunction. This expedient is not possible, of course, in this case, since, even if the waiver of a jury were assured, the Commissioner is required to make the preliminary examination and, in the case of processing taxes, the Board of Review is to find the facts. Moreover, the nature of the factual questions require not only evidence but an actual attempt by the taxpayer to show the incidence of the tax.

> priate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.

This Court has, moreover, refused to consider constitutional objections in situations offering some parallel to that now presented. In *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, the taxpayer, operating an interstate bus line, complained that the tax statute applicable to intrastate lines, based upon a quite different measure, imposed a smaller tax and thus discriminated against interstate commerce. The Court replied (p. 251):

> To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it. *General Tank Car Corp.* v. *Day,* 270 U. S. 367; *Hendrick* v. *Maryland, supra; Interstate Busses Corp.* v. *Holyoke Street Ry.,* 273 U. S. 45, 51. The record does not show that it made any attempt to do so.

More closely in point is *Boston & Maine R. Co.* v. *Armburg,* 285 U. S. 234. The railroad objected that a state Workmen's Compensation Act was unconstitutional because, among other reasons, it imposed the impossible task of allocating the payroll into hours of employment in interstate and in intrastate commerce. The Court rejected this argument because (p. 240):

> The state court thought that possible difficulties in making it could be dealt with

> administratively by rules framed by the State Insurance Commissioner, acting under authority of the Act. In any case, it is not self-evident that the Act is unworkable, and there is nothing on the record which would enable us to say that such allocation is either impossible or so difficult as necessarily to impose any burden on interstate commerce.

We think it plain that, prior to an actual test by the administrative authorities, no attack can appropriately be made upon the methods provided in Section 902 and Section 907 by which to ascertain the amount of the tax burden which petitioner bore.[52] Thus the Court of Claims in *Continental*

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[52] A somewhat analogous situation is found in the decisions which have dismissed bills to enjoin collection of the tax on unjust enrichment imposed by Title III of the Revenue Act of 1936 and holding that the objections to the method of calculation could only be determined in the ordinary procedure set up for administrative and judicial examination of tax controversies. *Sheridan Flouring Mills* v. *Cassidy*, 87 F. (2d) 20 (C. C. A. 10th), certiorari denied, No. 601, October Term, 1936; *Steinhagen Rice Milling Co.* v. *Schofield*, not yet officially reported but found in 1937 C. C. H., Vol. 3, p. 9377; (C. C. A. 5th), certiorari denied, No. 682, October Term, 1936; *White Packing Co.* v. *Robertson*, 17 F. Supp. 120 (M. D. N. C.), now pending on appeal in the United States Circuit Court of Appeals for the Fourth Circuit; *Star Milling Co.* v. *Magruder* (Md.), decided December 15, 1936, not yet officially reported but may be found in 1937 C. C. H., Vol. 3, p. 9238; *Utica Knitting Co.* v. *Shaughnessy* (N. D. N. Y.), decided December 9, 1936, unreported, appeal pending (C. C. A. 2d); *Southern Fabrics Corp.* v. *Higgins* (S. D. N. Y.), decided January 16, 1937, unreported; *Milburn By-Products Coal Co.* v. *Thurmond* (S. D. W. Va.), decided December 31, 1936, unreported; *Louisville Provisions Co.* v. *Glenn* (W. D. Ky.), 12 F. Supp. 545; see, *contra*:

Mills v. *United States,* 17 F. Supp. 138, 141, certiorari denied, No. 572, October Term, 1936, said, with respect to Section 902:

> It is sufficient to state, in addition to what has already been said, that this record contains no information tending to show that it is impossible to prove whether or not the tax in question was directly or indirectly included in the price of the article in respect of which it was imposed.

And Judge Wilkerson in *Cudahy Packing Co.* v. *Harrison* (N. D. Ill.), decided February 9, 1937, not yet reported but found in 1937 C. C. H., Vol. 3, p. 9405, said:

> If the requirements of the Act of 1936 are so stringent that it will be impossible for an honest taxpayer to comply with them, reliance must be placed upon the belief that the Congress will act with that "fine sense of honor", with which, as pointed out by the Supreme Court in *Moore Ice Cream Co.* v. *Rose, supra,* a high minded Government has heretofore dealt with its taxpayers.

An additional reason why the operation of Section 907 cannot now be considered is found in its separability from the rest of Title VII. The removal of the jurisdiction of the District Court

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Davis v. *Early* (E. D. Va.), decided December 1, 1936, not yet reported but found in 1936 C. C. H., Vol. 4, p. 10399, and *Shenandoah Milling Co.* v. *Early* (W. D. Va.), decided November 23, 1936, not yet reported but found in 1936 C. C. H., Vol. 4, p. 10439.

accomplished in Sections 904, 906 (c), and 910 in order to compel claims to be filed under Title VII would plainly have been enacted whether or not Section 907 had been enacted, as would the substantive restriction of Section 902. See *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. Section 907 is merely designed to facilitate proof of the incidence of the tax, and petitioner rightly makes no reference to it in describing Section 902 as the axis of Title VII (Br. 73). It must follow that, regardless of the validity of Section 907, the rest of Title VII would remain. Thus the validity of that section seems to be wholly immaterial to the disposition of this case.

The established rule as to the proper scope of constitutional litigation can be applied in this case with no danger of injury to petitioner. If, upon an appropriate record and in the light of an actual attempt by the taxpayer to show the incidence of the processing tax, this Court should hold any part of Title VII invalid, the taxpayer may recover all of the taxes to which he is entitled under such a decision, with interest at 6 per cent per annum (Sec. 908 (a); Sec. 614 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791). For, whether or not Section 902 and Section 907 be held invalid, the Board of Review would still remain as a mechanical means by which to enforce the decision of a circuit court of appeals or of this Court. Even if Section 902 were held invalid, and recovery allowed on mere proof of payment of Agricultural Ad-

justment Act taxes,[53] the Board of Review would still have jurisdiction to review the allowance or disallowance of any claim, and the circuit courts of appeals and this Court would still have power to direct the Board to enter any designated judgment. And Section 906 (b) provides that "the Commissioner shall make refund of any such amount determined by a decision of the Board which has become final."

We have, to this point, been discussing the prematurity of any decision as to the manner in which the methods of determination provided in Section 907 will actually work out in practice. These considerations apply with added force so far as petitioner may be considered to be attacking the actual application of Section 902 to floor stocks and import compensating taxes. For, as to them, the statute provides no particular method by which to make this determination. It may be supposed, since the taxes are laid at a given moment instead of over a continuous period of manufacturing, that a simple comparison of prices over a few weeks will be sufficient to determine if the burden of the tax was shifted. However this may be, petitioner makes no attack upon the method of determining the incidence of these taxes.

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[53] We assume that, if the Court is considering the constitutionality of Sections 902 and 907, it has rejected our argument (*supra*, pp. 26–28) that Congress would have preferred making no refund whatever to this situation.

We see, therefore, no manner in which the petitioner can be injured if the questions raised as to the application of Section 907 be postponed until they may be considered in the light of an actual attempt by taxpayers to show the incidence of the Agricultural Adjustment Act taxes. There is thus no compelling reason why this Court should enter upon a speculative inquiry as to the practical operation of the presumptions and methods of proof outlined in Section 907. These intensely practical questions of economics and accounting cannot be answered *in vacuo*, but only with reference to actual facts and in the light of the expert judgment of the officials charged with the administration and application of Title VII. Petitioner, in simple terms, is crying before it is hurt.

Accordingly, it is our view that this Court, if it considers their constitutionality relevant to the disposition of this case, may consider the general principle of Section 902 and the procedural system provided for the refund of Agricultural Adjustment Act taxes, but cannot appropriately or accurately pass judgment on the methods of proof provided by Section 907.

We shall, of course, also deal with the latter question in this brief. But, to a large extent, the discussion must necessarily consist of opposing our conjectures as to the actual operation of Section 907 to those of petitioner. However thoroughly

petitioner has explored the subject, however reasonable we feel our predictions to be, the fact remains that there cannot emerge the factual certainty which alone can justify a decision as to the constitutionality of an Act of Congress.

VI

The Procedural Provisions of Title VII Are Constitutional

1. The remedy for the recovery of floor stocks taxes

Section 905 of the Revenue Act of 1936 (*infra*, p. 167), provides in substance that, after denial by the Commissioner of a claim for refund, suits may be brought against the United States in the Court of Claims or the District Courts for the recovery of all taxes imposed under the Agricultural Adjustment Act other than processing taxes. This provision will apply to the floor stocks taxes involved in this suit.

The petitioner makes no argument that the machinery set up by Section 905 for the recovery of floor stocks taxes is unconstitutional or inadequate. We can think of no argument of substance which can be directed at this procedure.[44]

[44] There is, of course, no constitutional right to a trial by jury in a suit to recover taxes. *Auffmordt* v. *Hedden*, 137 U. S. 310; *Wickwire* v. *Reinecke*, 275 U. S. 101, 105–106; *Phillips* v. *Commissioner*, 283 U. S. 589, 599 n.

2. THE REMEDY FOR THE RECOVERY OF PROCESSING TAXES

Section 906 (b) establishes in the Treasury Department a Board of Review which is given exclusive jurisdiction to review the Commissioner's allowance or disallowance of claims for the refund of processing taxes and to determine the amount of refund due the taxpayer. The Board is composed of nine members appointed by the Secretary of the Treasury from officers and employees of the Treasury Department, one being designated by the Secretary as Chairman. The Chairman is given authority to divide the Board into divisions of one or more members, and in the case of a division of more than one member to designate a chief of the division.

Under Section 906 (a) the Commissioner is required to act on all claims for refund within three years after they are filed unless the taxpayer consents to an extension of time, and under subdivision (c) the Commissioner is required to give notice of his action on the claim by registered mail. The taxpayer is given three months from the receipt of this notice in which to file a petition for review with the Board of Review (Sec. 906 (c)). If a petition for review is filed, the taxpayer is entitled to a public hearing before a member of the Board or an officer or employee of the Treasury Department designated as presiding officer (Sec. 906 (c) and (d)). The hearing is to be held either at Washington or at the taxpayer's principal place of business, as he shall specify, or at any other place stipulated

by the Commissioner and the taxpayer. (Sec. 906 (c).) The proceedings are required to be conducted in accordance with such rules of practice and procedure, other than rules of evidence, as the Board may prescribe, with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable to courts of equity of the District of Columbia. Both the claimant and the Commissioner are entitled to be represented by counsel, to have witnesses subpoenaed, depositions taken, and records produced (Sec. 906 (d)).

Subdivision (e) requires the presiding officer to recommend findings of fact and a decision to the Board or a division, and provides that the Board or division shall make findings of fact and enter decision. The findings and decision of a division become those of the Board within thirty days unless the Chairman direct that they be reviewed by the Board. The decision of the Board may be reviewed by the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia for errors of law, and by this Court on certiorari (Sec. 906 (g)). In such a case, the Board is required to certify to the appellate court a transcript of the record on which the findings and decision of the Board were based. The decision of the Board becomes final in the same manner as do those of the Board of Tax Appeals under Section 1005 of the Revenue Act of 1926 (c. 27, 44 Stat. 9; U. S. C., Title 26, Sec. 640). The Commissioner is required

to make any refund finally determined by the Board (Sec. 906 (c) and (g)).

Thus the procedure in the Board of Review is in general similar to that in the Board of Tax Appeals, and the provisions for the review of the Board's decision by the Circuit Court of Appeals for errors of law is substantially the same as the statutory provision authorizing those courts to modify or reverse decisions of the Board of Tax Appeals when not in accordance with law. See Section 1003 of the Revenue Act of 1926 (U. S. C., Title 26, Sec. 641). In fact, a somewhat more complete review is assured under Section 906 for the reason that that section requires that a transcript of the record be filed in every case, and the Circuit Court of Appeals is given specific authority to order additional evidence to be taken before the presiding officer when there are reasonable grounds for failing to adduce it at the original hearing. Under the procedure relating to review of Board of Tax Appeals decisions the taxpayer, as a result of an inadequate record, has sometimes found himself in the position of trying to argue questions not raised by the record. See, for example, *Heinz* v. *Commissioner*, 70 F. (2d) 461 (C. C. A. 5th).

The petitioner does not argue that there is not a sufficient judicial review of the decisions of the Board of Review to constitute due process of law, and we submit that any such contention would be foreclosed by the decisions sustaining the analogous procedure for review for decisions of the

Board of Tax Appeals. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Phillips* v. *Commissioner,* 283 U. S. 589. However, it seems desirable that we briefly indicate that Section 906 is well within the constitutional requirements for judicial review of administrative action.

The history of the customs administration demonstrates that judicial review of administrative action in regard to tax refunds is not required by the Constitution. *Cary* v. *Curtis,* 3 How. 236, 244–245, held constitutional the Act of 1839, the effect of which was to forbid *all* judicial trial or review. It has never been overruled and, indeed, was cited in *Ex parte Bakelite Corp.,* 279 U. S. 438, 458, for the proposition that final determination of protests against the rulings of customs collectors and appraisers "has been at times confided to the Secretary of the Treasury with no recourse to judicial proceedings." From 1845 to 1890 suit was allowed against the collector. But the Customs Administration Act of 1890 (c. 407, 26 Stat. 131) provided that the collector should not be liable for errors in collection of a type which could be appealed to the Board of Appraisers (sec. 25). *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693–695; *United States* v. *Passavant,* 169 U. S. 16, 21. A decision of the Board could be appealed to a circuit court, but the remedy was against the United States and the decision of the Board was final as to valuation. *Earnshaw* v. *United States,* 146 U. S. 60, 66; *Passavant* v. *United States,* 148 U. S.

214, 218, 221; *United States* v. *Klingenberg,* 153 U. S. 93. The remedy provided by the Act of 1890 was exclusive. *United States* v. *Lies,* 170 U. S. 628. Under the present procedure the Customs Court has been substituted for the Board of Appraisers and appeal is taken to a legislative court, the Court of Customs and Patent Appeals. (Judicial Code, Secs. 195, 196; U. S. C., Title 28, Secs. 308–309.) *Ex parte Bakelite Corp, supra,* 451–452, 458; *United States* v. *Stone & Downer Co.,* 274 U. S. 225. We see no reason why these decisions are not fully applicable to internal revenue taxes.[55]

In addition, this Court has frequently held that there is no denial of due process when a state provides only an administrative hearing by which to determine the amount of taxes due. *Londoner* v. *Denver,* 210 U. S. 373; *Pittsburgh Ry.* v. *Board of Public Works,* 172 U. S. 32; *Davidson* v. *New Orleans,* 96 U. S. 97; *Kelly* v. *Pittsburgh,* 104 U. S. 78.

However, Title VII does not go as far as these cases would permit. By Section 906 (g) the circuit courts of appeals are given jurisdiction to review the decision of the Board of Review, and "to modify or reverse such decision, if it is not in accordance with law." This, of course, includes

[55] While the import duties are imposed by virtue of the power to regulate foreign commerce as well as the taxing power, *Board of Trustees* v. *United States,* 289 U. S. 48, this, even if the duties were not taxes, would offer no justification for a procedure which would deny due process in regard to their refund.

the power to review constitutional questions, questions of general and statutory law, and whether the findings of the Board are supported by any substantial evidence. *Phillips* v. *Commisioner,* 283 U. S. 589; *Old Mission Co.* v. *Helvering,* 293 U. S. 289. There can be no substantial doubt but that every requirement of judicial review is satisfied by a procedure which ensures judicial determination of these questions.[56]

However, petitioner attacks the procedure provided by Section 906 not on the ground that the judicial review is inadequate but because the administrative hearing before the Board is itself

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[56] See, for example, the review provided for the Interstate Commerce Commission: *Cincinnati Ry.* v. *Interstate Commerce Commission,* 206 U. S. 142, 154; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665–666; *Florida* v. *United States,* 292 U. S. 1, 12; the Federal Trade Commission: *Federal Trade Commission* v. *Pacific Paper Assn.,* 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Co.,* 291 U. S. 67, 75; the Federal Radio Commission: *Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, 276–277; immigration proceedings: *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 660; *United States* v. *Ju Toy,* 198 U. S. 253, 261–263; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 358; postal regulations: *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108–110; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 413; administration of the public lands: *Cameron* v. *United States,* 252 U. S. 450, 464; *Burke* v. *Southern Pacific R. Co.,* 234 U. S. 669, 684–687; workmen's compensation hearings: *Crowell* v. *Benson,* 285 U. S. 22, 48; *Voehl* v. *Indemnity Ins. Co.,* 288 U. S. 162, 166; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287; administration of the Packers and Stockyards Act: *Tagg Brothers* v. *United States,* 280 U. S. 420, 443; *Acker* v. *United States,* 298 U. S. 426, 434; *Morgan* v. *United States,* 298 U. S. 468, 477.

deemed to deny taxpayers due process of law. This is said to result because (1) the members of the Board of Review are taken from the Treasury Department; and (2) the hearing may be either before a member of the Board or an official of the Treasury Department, while the decision will be rendered by some member of the Board who did not hear the evidence.

1. We see no merit whatever in the argument that the Board hearing does not accord due process because the members of the Board are taken from the Treasury Department. Congress believed that the issue of fact as to whether or not the claimant bore the economic burden of the tax would be relatively simple in the case of taxes other than processing taxes, while in the case of processing taxes that question would involve "extremely complicated economic and accounting considerations." S. Rep. No. 2156, 74th Cong., 2d Sess., p. 33. The thought of Congress was plainly that a body of experts with previous training in the field of taxation would be the most capable of passing upon the complicated questions arising with respect to processing taxes. There is, of course, no intention on the part of the Treasury Department to permit its officers and employees who have any part in the actual assessment and collection of the processing taxes to review their own acts as members of the Board of Review. The mere fact that the Commissioner is an officer of the same Department as are the members of the Board and any other employee

designated to act as a presiding officer does not disqualify them. There cannot possibly be that personal and pecuniary interest condemned by this Court in *Tumey* v. *Ohio,* 273 U. S. 510, upon which petitioner relies (Br. 72).

In any event, petitioner's contentions ignore the uniform and plainly constitutional practice in establishing an administrative agency or tribunal. It seems unnecessary to discuss the various Federal administrative agencies since none can doubt but that each combines investigatory and judicial functions in the same agency and that their constitutionality is beyond attack on this score. No argument can be based upon the Treasury Department's interest in collecting taxes. In the first place it ignores the interest which every regulatory administrative agency or tribunal must, by definition, have which is adverse to those which it regulates. Moreover, as this Court said in *Ex parte Bakelite Corp.,* 279 U. S. 438, a review of the determinations of the customs collector has at times been confided solely to the Secretary of the Treasury. See also a recent decision of this Court, sustaining the power to lodge regulatory powers over shipping in the Department of Commerce even though the Department also operated competing vessels. *Swayne & Hoyt, Ltd.* v. *United States,* No. 494, October Term, 1936, (pamphlet, p. 3); *cf. Isbrandtsen-Moller Co., Inc.,* v. *United States,* No. 307, October Term, 1936 (pamphlet, pp. 2, 7).

2. There is no provision in the statute to the effect that one officer or member of the Board shall hear the evidence and another shall decide the case. Section 906 (b) provides that the Chairman of the Board shall divide it into divisions and that he shall designate the presiding officer to conduct each hearing. This presiding officer may be either one of the members of the Board or an officer or employee of the Treasury Department designated by the Secretary of the Treasury. The presiding officer is then required by Section 906 (e) to recommend findings of fact and a decision to the Board or "the proper division thereof", and the Board or such division must make the findings or render the decision. If the presiding officer himself is a Board member and constitutes a division, his own findings will constitute the findings of his division. If he is one member of a division, his recommendations as to findings will be considered by the division of which he is a member and its findings made. If the presiding officer is not a member of the Board at all, he merely recommends findings to a division of the Board and it makes the findings. Where the Chairman orders a review by the full board, the full Board itself will make the findings. In other cases the findings of the division become the findings of the Board. Whether the recommended findings are being considered by a division or its findings by the full Board, both the Commissioner and the taxpayer are given the opportunity

to file briefs and, on specific order, to present oral argument.

This procedure is not very different from that which obtains in reviews by the Board of Tax Appeals. Section 906 of the Revenue Act of 1924, as amended by Section 601 of the Revenue Act of 1928 (U. S. C., Title 26, Secs. 603, 617) provides that a division shall hear and decide each case and make findings, and that the findings and decision of the division shall become the findings and decision of the Board unless the Chairman orders a review by the full Board. It is possible, therefore, that members of the Board of Tax Appeals who have not heard the evidence may cast the deciding vote and reverse the decision of the Board member who did. But that procedure has been accepted without question. *Cf. New Orleans Shipwright Co.* v. *Commissioner,* 27 F. (2d) 214 (C. C. A. 5th).

It is true that in the case of the Board of Review, as distinguished from the Board of Tax Appeals, an officer or employee of the Treasury Department who is not a member of the Board may hear the evidence. Such a presiding officer will serve the same function as a special master.[57] The division or full Board will review his recommended findings and the evidence upon which they are based, and

[57] See United States Supreme Court Equity Rule 61½; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 181–182; *Roosevelt* v. *Missouri State Life Ins. Co.*, 78 F. (2d) 752 (C. C. A. 8th).

make its own findings, after written (and, on order, oral) argument by the parties. Additional protection is found in the fact that the Circuit Court of Appeals may order additional evidence to be adduced before the presiding officer.

The case of *Morgan* v. *United States,* 298 U. S. 468, cited by the petitioner (Br. 71), is authority for the Government. It was there held that both the Packers and Stockyards Act and the principles of orderly administrative law required that the order be made by one who has considered the evidence. Under Section 906 it is impossible that any decision could be made in the Board of Review by any division or the full Board without consideration of the evidence. Moreover, the procedure of Section 906 seems to be sanctioned beyond the possibility of argument by the *Morgan* case. The court said (p. 481):

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.

We know of no other objection which can reasonably be raised to the procedure of the remedy provided for the refund of processing taxes. If there be any, it may be answered, as might the specific objections of the petitioner, merely by reference to the general principles which control a question of due process in the procedural sense. The term "due process" was borrowed from the English "law of the land" (*Davidson* v. *New Orleans*, 96 U. S. 97, 101), and does not necessarily mean judicial process (*Public Clearing House* v. *Coyne*, 194 U. S. 497, 509; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272); nor does it mean any particular kind of proceeding (*Insurance Co.* v. *Glidden Co.*, 284 U. S. 151). The due process clause of the Fifth and Fourteenth Amendments merely requires that the Federal and State Governments shall not deprive one of his property or liberty without such notice and hearing as is commensurate with the necessities of the case and the character of the rights affected. *Buttfield* v. *Stranahan*, 192 U. S. 470, 496–497; *United States* v. *Ju Toy*, 198 U. S. 253; *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226; *Phillips* v. *Commissioner*, *supra*. We submit that the procedure under Section 906 plainly accords a full and fair hearing, with adequate judicial review, and cannot be said to violate any of the requirements of due process of law.

VII

The Substantive Provisions of Title VII Are Constitutional

The basic purpose of Title VII is to limit the refund of Agricultural Adjustment Act taxes to the extent that their economic burden was borne by the taxpayer. Neither petitioner nor any of the seven briefs filed *amici curiae* suggest that the economic burden of these taxes was in fact borne by the typical processor. Petitioner none the less attacks Title VII as unconstitutional. The attack takes two forms: (1) a denial that Congress has power in this manner to limit the refund of illegal taxes, on the ground that whether or not the taxpayer was burdened by their imposition "is no business of the Government or the respondent" (Br. 61);[56a] and (2) a charge that it is, in any event, impossible either under Title VII or any other method to determine the extent of tax-shifting. As we have earlier indicated, we do not believe either of these arguments to be relevant to the disposition of this case and, even if relevant, we do not believe that petitioner's speculations as to the possibility

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[56a] The position of these taxpayers is stated even more strongly in the brief filed *amici curiae* by Messrs. Hale and Sanderson. They state that whether or not the taxpayer shifted the burden of the tax "in plain language is none of the government's business" and describe Section 21 (d) and Title VII as apparently "no more than successive hurdles wantonly cast in the way of taxpayers seeking their own property" (Br. 5, 7).

of proof are permissible on this record. We shall, however, discuss both points.

1. THE LIMITATION UPON REFUND: SECTION 902

Section 902 (*infra*, p. 165) provides in part:

> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists

> whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; * * *

Petitioner argues (Br. 30–33) that section 902 is so vague and uncertain as to be meaningless. But section 902, in allowing a refund only when the claimant "bore the burden" of the tax, and has not "shifted such burden", was plainly intended to deny a refund of taxes to claimants who had suffered no economic injury because of their imposition.[57]

Like Section 21 (d) of the Agricultural Adjustment Act (*infra*, p. 182), it was adopted as a result of the legislative recognition of the principle that a taxpayer who is allowed the refund of a tax, the economic burden of which has been borne by another, has been unjustly enriched. In consequence, to the extent of this unjust enrichment, he should be denied the right of recovery. See S. Rep. No. 2156, 74th Cong., 2d Sess., p. 33; H. Rep. No. 1757, 74th Cong., 2d Sess., p. 32.

1. We submit that any argument to the effect that such a condition could not be attached to the right of recovery is foreclosed by the decision of

[57] Petitioner's argument that Section 902 "is so vague and uncertain as to be meaningless" (Br. 30) rests in part upon the erroneous premise that the section contemplates a comparison of the prices actually paid and received with those obtaining had there been no tax. We have accordingly treated this argument under the subsequent section dealing with the methods of proof. (See *infra*, pp. 145–148.)

this Court in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

That case involved Section 424 of the Revenue Act of 1928 (c. 852, 45 Stat. 791). That provision, like the one here involved, was enacted after the Government had collected substantial sums illegally.[58] Section 424 provided that no refunds should be made of amounts paid by or collected from any manufacturer, producer, or importer under the automobile accessories tax imposed by Section 600 (3) of the Revenue Act of 1924, or Section 900 (3) of the Revenue Acts of 1918 and 1921, unless, *inter alia,* the claimant should establish (1) that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or (2) unless the Commissioner should certify that the claimant had given a bond conditioned upon the immediate repayment to the United States of such portion of the amount refunded as was not distributed by the claimant within six months after the date of the refund to the persons who had purchased the articles for consumption (whether the purchase was made from the manufacturer or from another party).

In the *Jefferson Electric Co.* case, as in the case at bar, the taxes were collected and the refund

[58] In that case the taxes had been collected on articles which were not embraced within the statute. See H. Rep. No. 2, 70th Cong., 1st Sess., p. 27.

claims denied before the statute was passed which required the claimant to prove that he had borne the tax as a condition precedent to recovery. The Court held that Section 424 was "an additional substantive element of the right to a refund" (p. 397), to be alleged and proved in the same manner as other elements of the right to recover (pp. 397–400), and that the imposition of this condition did not strike down any vested rights. The Court said (pp. 401–402):

> If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that § 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them. ***But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief.***

> This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
>
> We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them. [Italics added.]

The *Jefferson Electric Co.* case seems to settle beyond dispute that no taxpayer has a constitutional right to the refund of illegal taxes unless he has borne the economic burden of their imposition. Petitioner insists (Br. 65–69) that the case can be distinguished. Distinctions, it is true, may be drawn between the *Jefferson Electric Co.* case and that at bar. These distinctions might appropriately be emphasized were the question one possessing the precision and the nicety of common law pleading. But they have no place when the question relates to the constitutional power of Congress as confined by the general limitation "due process of law."

Thus, petitioner bases its distinction upon the belief that this Court viewed Section 424 as applicable only when the taxpayer collected the amount of the tax as a separate item from the vendee. Even if this were accurate, it would leave untouched the plain fact that this Court has sanctioned the refusal to refund illegal taxes to one who, although he paid them, did not bear their burden. More than this need not be drawn from the *Jefferson Electric Co.* case to sustain the validity of Section 902.

However, it seems desirable to point out that the *Jefferson Electric Co.* case is not to be confined so narrowly as petitioner urges. Its argument, in effect, seeks to convict this Court of a complete disregard of the language of Section 424 and of its legislative history. For the section forbids refund if the amount of the tax was "collected, directly *or indirectly*", from the purchaser. Its legislative history makes plain that the italicized words have their natural meaning as something beyond collection as a separate item, a provision which was expressly rejected in conference.[39]

[39] Prior to the enactment of Section 424, Congress forbade any refund of the automobile accessories tax unless a bond were given to distribute it within six months to the persons who purchased the accessories for consumption. Deficiency Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254. This was done to permit study of the situation. H. Rep. No. 2, 70th Cong., 1st Sess., p. 27. The House passed the bill which became the Revenue Act of 1928 (H. R. 1) with Section 424 (so far as here relevant) as it was enacted. The bill was reported to the Senate with this limitation upon

Moreover, the Government did not confine its argument in the *Jefferson Electric Co.* case, as petitioner suggests (Br. 66), to cases where, because the tax was separately collected, the taxpayer would be liable in quasi-contract to his vendee if he kept the tax refund.[60] This Court in its opin-

refund entirely eliminated. It was amended from the floor to permit refund if the tax "was not added separately on the invoice to the purchaser." This provision was stricken in conference and the language of the House bill restored. See Revenue Act of 1928 in Its Various Forms. (H. R. 1, 70th Cong., 1st Sess.); H. Rpt. No. 1882, 70th Cong., 1st Sess., pp. 19–20 (containing a somewhat inaccurate summary of the provision as it passed the House).

[60] The sentence just before those quoted by petitioner (Br. 66) states that Section 424 was enacted because "Congress believed that in many cases refunds of taxes * * * would unjustly enrich manufacturers who had not borne the burden of the taxes." That just after those quoted by petitioner reads: "Congress provided in substance that a refund should not be made if it would in effect be a windfall to the taxpayer." Brief in *American Chain Co.* v. *Eaton*, No. 196, October Term, 1933, pp. 13–14. This language seems to embrace all forms of tax shifting.

Moreover, in its brief in *United States* v. *Jefferson Electric Co.*, No. 171, October Term, 1933, the Government brief replied to the argument that a failure to raise the price amounted to a return of the amount of the tax to the vendee as follows (p. 15):

> * * * So many factors enter into the establishment of the price at which an article may be profitably marketed that we think the fact that the total charged to the customer remains stationary is not necessarily an indication of where the burden of an excise tax is falling. * * *

This was amplified in a footnote (pp. 15–16):

> There is, for example, nothing in the record to show whether changes in the cost of manufacturing

ion repeatedly used the phrases "directly or indirectly" collected the tax (pp. 395, 397, 400), "bore the burden of the tax" (pp. 397, 400, 401, 402), or "shifted the burden" of the tax (pp. 401, 402); nowhere does it indicate an interpretation restricted to collection as a separate item.[61] Indeed, after remand of the cases covered by the *Jefferson Electric Co.* opinion, the District Court in *Willard Storage Battery Co.* v. *Routzahn* (N. D., Ohio), decided October 3, 1935, not officially reported but found in 1935 C. C. H., Vol. 3A, p. 10,501, denied recovery in part even though the tax had not been collected as a separate item from its customers (pp. 10,503–10,504). The fact that this Court naturally relied heavily upon collection as a separate item does not mean that this conclusive test of shifting the burden of the tax is the only one which Con-

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(with all the items therein included) affected the price charged for respondent's articles. Again, competition or other market conditions may have been responsible for the failure to increase prices to the purchaser.

This clearly indicates that the Government viewed the limitation as going beyond merely collection of the tax as a separate item.

[61] Petitioner relies (Br. 68) on the statement (p. 402) that "if the taxpayer has borne the burden of the tax, he can readily show it." We do not agree that the taxpayer would be able readily to show that he bore the economic burden only if his failure to collect the tax as a separate item were conclusive. The statement in the Government's brief in the *Jefferson Electric Co.* case (footnote 40 *supra*) shows that manufacturing costs and market conditions were considered appropriate and available for evidence in the trial court.

gress had adopted in Section 424; much less does it make this the farthest boundary of Congressional power.[62]

2. The basic principle of Section 902 is sanctioned not only by the *Jefferson Electric Co.* case but by the equitable principles which underlie the action for money had and received. The action "aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff." *Claflin* v. *Godfrey,* 38 Mass. 1, 6, quoted in *United States* v. *Jefferson Electric Co., supra,* 403. Or, as this Court said in *Myers* v. *Hurley Motor Co.,* 273 U. S. 18, 24, "The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience is not entitled to recover in whole or in part." See, also,

[62] Much of the confusion in the petitioner's brief on this subject arises from the fact that it fails to distinguish between the nature of the problem involved in determining when the burden of a tax, whether sales or manufacturing, has been shifted directly or indirectly, and that of the problem of determining *what is* the sales price on which the sales tax is to be computed. Article 3 of Regulations 47, promulgated under the Revenue Act of 1921, which it cites (Br. 68), deals with the latter problem in cases where the manufacturer has billed the selling price and the tax in various ways. Rulings as to when the tax shall be included in the selling price for the purpose of computing a sales tax may have some bearing on the question of tax shifting where the tax is billed to the purchaser as a separate item, but it has none in other situations. S. T. 785, XIII-2 Cumulative Bulletin 413, shows the rules laid down for determining when the tax burden has been shifted under circumstances where the tax was not billed separately.

Lewis v. *Reynolds*, 284 U. S. 281, 283; *Bull* v. *United States*, 295 U. S. 247, 261–262. The doctrine of unjust enrichment has, moreover, received a wide application in tax cases even without the aid of a statute.[63] Thus the court in *Champ Spring Co.* v. *United States*, 47 F. (2d) 1, 3 (C. C. A. 8th), certiorari denied, 283 U. S. 852, said:

> * * * It therefore cannot be said that in equity and good conscience the plaintiff, as against the defendant, was entitled to this money. Before it could recover, it must show a better right thereto than that of the government, and this it has failed to do.

We can see nothing unconstitutional in a statute such as Section 902, which does no more than to restate this doctrine so as to require the claimant to show that the money he claims has not been recouped from others.

Even in the absence of statute the Illinois courts have denied recovery against a tax collector on the ground that the plaintiff who has shifted the burden

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[63] *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82 (C. C. A. 2d); *New York Life Ins. Co.* v. *Anderson*, 263 Fed. 527 (C. C. A. 2d); *Ralston Purina Co.* v. *United States*, 58 F. (2d) 1065 (C. Cls.); *White* v. *Stone*, 78 F. (2d) 136 (C. C. A. 1st), certiorari denied, 296 U. S. 596, and granted on March 1, 1937; *First Nat. Bank of Birmingham* v. *United States*, 12 F. Supp. 301 (N. D. Ala.); *State ex rel. Bettman* v. *Canfield Oil Co.*, 34 Ohio App. 267, 275; *People* v. *Ventura Refining Co.*, 204 Cal. 286; *Standard Oil Co.* v. *United States*, 5 F. Supp. 976, 985 (C. Cls.), certiorari denied, 293 U. S. 599; *United States ex rel. Girard Trust Co.* v. *Helvering*, 85 F. (2d) 230 (App. D. C.), certiorari granted on March 1, 1937, No. 285.

of the tax does not come into equity with clean hands when he asks their refund. *Richardson Lubricating Co.* v. *Kinney*, 337 Ill. 122; *Standard Oil Co.* v. *Bollinger*, 337 Ill. 353.

3. Petitioner urges that, even if the economic burden of the tax was borne by its vendees or the consumer, this does not present the type of unjust enrichment upon which the Congress could constitutionally act in providing for the refund of these taxes (Br. 52–58). Its argument is based upon the premises that the processed articles were sold in a free market, at a flat price which did not separately specify the amount of the tax, and that its vendees were in no sense misled as to the fact that the purchase price included at least in part the amount of a tax which might be held unconstitutional. With these premises we have no quarrel.

Nor do we deny that, under these circumstances, the vendee would be unable to recover the amount of the tax from the taxpayer who failed to pay the tax or obtained its refund. *Casey Jones, Inc.*, v. *Texas Textile Mills*, 87 F. (2d) 454 (C. C. A. 5th).[64] So, too, would the vendee[65] be unable to recover the

[64] See, also, *Heckman & Co.* v. *Dawes & Son Co.*, 12 F. (2d) 154 (App. D. C.); *Texas Co.* v. *Harold*, 228 Ala. 350; *Moore* v. *Des Arts*, 1 N. Y. 359. Compare *Wayne County Produce Co.* v. *Duffy-Mott Co.*, 244 N. Y. 351, where the taxpayer-vendor collected the tax as a separate item.

[65] The decision in the *Lash's Products* case was that the taxpayer could not recover a part of a tax of 10 percent of the selling price on the theory that the selling price was only 90 percent of the price received.

amount of the tax from the Government, for, even though he pays the seller more, "the purchaser does not pay the tax." *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176. The circumstances emphasized by petitioner are material to the existence of quasi-contract, which alone can support action by the vendee. But since the economic fact of tax-shifting remains the same whether or not the elements of quasi-contract are present, the inability of the vendee to recover from the taxpayer has no bearing on the constitutional power of Congress.

A related objection to Title VII is based upon the power of Congress to impose a manufacturing tax upon articles sold to a government instrumentality which has a constitutional immunity from taxation. *Liggett & Myers Tobacco Co.* v. *United States,* Nos. 161–163, October Term, 1936. But this principle goes no further than the unquestioned doctrine that it cannot be said *a priori* that the purchaser will in every case bear the burden of the amount of the tax. Plainly there should be no immunity from taxation because of the governmental character of the purchaser if it is not certain that the tax will be reflected in the selling price. Title VII makes elaborate provision for the determination in each particular case of whether or not the burden of the tax was shifted to either the purchaser or the seller of the raw commodity.

4. Petitioner also argues that, if the taxpayers were to be unjustly enriched by the refund, this is no concern of the Government but relates only to

the equities between the taxpayer and his vendees (Br. 61–65). But, as we have earlier demonstrated (*supra*, p. 93), retention by the Government of taxes whose burden has been shifted to the consumer is the closest possible approximation of their refund to those who actually bore the burden of the taxes. Even where the administrative aspects did not make it plainly impossible to refund to the one who actually was injured, this Court in *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 484, has upheld the analogous power of the Government to recapture excess earnings of railroads, arising because of the necessity of maintaining uniform rates.[66] It said that the excess

> may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier.

Moreover, whatever the equities of the consumer, this does not benefit the petitioner. The equitable defense of unjust enrichment to the action for money had and received is directed not at the strength of the defendant's claim but at the weakness of that of the plaintiff (see *supra*, pp. 129–

[66] The Court relied upon the fact that the rates, though excessive for a strong road, were reasonable for the shipper. We view the shipper's resulting inability to insist upon reduction as the equivalent of the consumer's inability to recover the amount paid as a result of Agricultural Adjustment Act taxes.

131). As this Court, in *Dayton-Goose Creek Ry.* v. *United States, supra,* 484, said of the analogous claim of the railroads, this "is an objection which the carrier cannot be heard to make."

The contention that the Government must assert a better right than the claimant if it is to prevent his unjust enrichment seems to be foreclosed by the decision in *Perry* v. *United States,* 294 U. S. 330. There this Court held that repudiation of the gold clause in Government bonds left the holders without actual damage, because (pp. 357–358):

> Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.

The statement in *Bull* v. *United States,* 295 U. S. 247, 260, that morality and conscience requires the refund of taxes illegally collected, related to a case where the retention was to the detriment of the taxpayer, not where the taxpayer was grounding his claim to an unjust enrichment on the equities of

third persons to whom it is impossible to make refunds.[67]

Petitioner relies on *Southern Pacific R. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531; *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234–238; see also *Adams* v. *Mills*, 286 U. S. 397, 406–409. These cases arose under Section 8 of the Interstate Commerce Act, which contains no limitation upon recovery by one who has not borne the burden. They held that the shipper (or consignee) could recover reparation for overcharges by the carrier notwithstanding the defense that the shipper was made whole by his customers. Each of the decisions recognized that the shipper would be unjustly enriched if he did not make restitution to his customers. Since the suit for reparation, in contrast to that to recover taxes, is not based on equitable principles, this circumstance was immaterial. Even if the cases were otherwise similar, these cases contain no hint that they were announcing a limitation upon the constitutional power of Congress.

5. Petitioner argues that Section 902 fails to recognize that the cotton processors suffered consequential damages from the processing tax, resulting from a hypothetical lowering of the volume of sales because of increased prices (Br. 58–61). We believe this objection more properly consid-

[67] We do not argue that Section 902 (b) offers any substantial possibility of reimbursing the ordinary consumer.

ered in regard to the methods of computation provided by Section 907 (see *infra*, pp. 155–158). It is sufficient at this point to indicate that the consequential benefits flowing from an increased purchasing power created by benefit payments under the Agricultural Adjustment Act might be expected to, and did (see *supra*, note 43, p. 92), more than offset this factor. The objection is thus without weight so far as the validity of the general principle underlying Section 902 is concerned.

6. The petitioner also insists (Br. 48–50) that Section 902 is made unconstitutional because it places the burden of proof upon the claimant. But it is obvious that the necessary accounting data are in the petitioner's possession. As we read petitioner's argument, most of its force depends upon its erroneous contention that it is impossible under section 907 to prove whether or not the burden of the tax was borne by the taxpayer. Thus, petitioner's objection that the facts are not within its control is bottomed upon the mistaken belief that it must prove what the prices would have been had the tax not been imposed. This contention is discussed at a later point (*infra*, pp. 145–148).

In any event, if Congress could attach this additional substantive element to the right of recovery, it obviously could require those seeking recovery to sustain the burden of proof with respect to this element as well as to all other elements of its claim. See *Lewis* v. *Reynolds*, 284 U. S. 281; *Reinecke* v.

Spalding, 280 U. S. 227; *United States* v. *Anderson*, 269 U. S. 422; *Helvering* v. *Taylor*, 293 U. S. 507.

A like burden of proof was placed upon the claimant under Section 424 of the Revenue Act of 1928, *supra*, and this provision was sustained in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.[68] Obviously the plaintiff in a suit to recover taxes paid is required to prove the amount of refund to which he is entitled, and if his recovery is conditioned upon his having borne the economic burden of the tax he must prove the refund due in the light of this condition.

There clearly can be no constitutional objection to legislation requiring a plaintiff to sustain the burden of proof, and Congress may appropriately legislate on such matters. Cf. *Selma, Rome & Railroad* v. *United States*, 139 U. S. 560, 566–568. Even without statutory authority the courts have held that the Commissioner's determination is *prima facie* correct and the taxpayer has the burden of proving it erroneous in a suit for refund or before the Board of Tax Appeals. *United States* v. *Rindskopf*, 105 U. S. 418; *Reinecke* v. *Spalding*, 280 U. S. 227; *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Rankin*, 295 U. S. 123; *Helvering* v. *Taylor*, *supra*.

7. We believe that we have demonstrated that Section 902 is immune to constitutional attack, and

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[68] See also, *Jefferson Electric Mfg. Co.* v. *United States*, 10 F. Supp. 950 (C. Cls.); *Virginia-Carolina Rubber Co.* v. *United States*, 7 F. Supp. 299 (C. Cls.).

that it merely enacts the well recognized limitation upon the action for money had and received, that the plaintiff must show that in equity and good conscience he is entitled to the recovery. The remaining discussion relates to the manner in which this general principle is translated into practical terms, to permit easier proof by both the Commissioner and the taxpayer. These provisions, found in Section 907, are not material to the validity of Section 902. Without them the course of judicial and administrative interpretation would be more difficult and less consistent. But the extent to which the tax burden was shifted can be approximated by a number of methods,[69] and there is no reason to believe the technique of cost-accounting to be beyond the capacity of courts far more familiar with accounting than, for example, with the scientific and industrial facts necessary for decision as to invention and infringement under the patent laws.[70]

So far as the floor stocks taxes are concerned, recovery of which is sought in this case, the inquiry must stop here. Section 907 is not applicable to the relatively simple problem of determining

[69] This might be done by a comparison of prices, or of profits, or by cost-accounting, or by examination of billing practices and contracts with purchasers.

[70] That it is possible for courts to consider these questions, of course, is not contradictory of the fact that it is desirable that they first receive the attention of the administrative experts contemplated by Section 906.

whether or not their burden was shifted.[71] Petitioner nowhere suggests that there is any impossibility or difficulty in proving the incidence of these taxes under Section 902 alone. Thus, the remaining discussion is directed to the question of the refund of processing taxes alone.

2. THE METHODS OF PROOF OF TAX ABSORPTION OR SHIFTING: SECTION 907

The questions which will here be discussed are those which cannot adequately be explored without a practical trial in connection with the facts of a specific case. We have earlier discussed the inappropriate and premature character of petitioner's attack on these provisions (*supra*, pp. 97–107. However, and not without regret for the added number of pages, we feel forced to discuss these questions. Our purpose is two-fold: again, to err on the side of caution in a case of this importance and, further, to remove any impression that Congress has attempted to destroy all remedy of the taxpayer (see Pet. Br. 10, 74–76). For we believe that examination of Section 907 will show that there has been a painstaking and solicitous regard for the processor who in fact bore the burden of the tax, with the result that there has been provided a method which, so far as can be determined by an *a priori*

[71] Generally, a simple comparison of sales prices before and after the imposition of the tax should be sufficient. The taxes were imposed on goods held ready for sale, and change or lack of change in the price on these goods would ordinarily be conclusive as to tax shifting or absorption.

examination, provides a thoroughly fair and practical method by which to determine tax absorption or shifting.

Section 21 (d) of the Agricultural Adjustment Act (*infra*, p. 182) had been criticized by several lower courts because of its indefiniteness.[72] In response to this criticism Section 907 was enacted. Sen. Rpt. No. 2156, 74th Cong., 2d Sess. It is designed to provide a specific and practicable method by which the claimant can prove that he has borne the burden of the processing tax and, at the same time, not to foreclose his proof along any line that better fits the facts of his particular case.

The broad premise of Section 907 (*infra*, p. 173) is that any decline in earnings during the period of the tax, which is unexplained by other changes, will indicate that the processor bore the burden of the tax, while constant or increased earn-

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[72] See, for example: *Shenandoah Milling Co.* v. *Early* (Va.), decided November 23, 1936, not yet officially reported, but found in 1936 C. C. H., Vol. 4, p. 10,439; *Baltic Mills Co.* v. *Bitgood*, 12 F. Supp. 132 (Conn.); *John A. Gebelein, Inc.*, v. *Milbourne*, 12 F. Supp. 105 (Md.); *G. B. R. Smith Milling Co.* v. *Thomas*, 11 F. Supp. 833 (N. D. Tex.); *Kingan & Co.* v. *Smith*, 12 F. Supp. 329 (S. D. Ind.); *A. P. W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (N. D. N. Y.).

Other courts reached a contrary conclusion. See *Rieder* v. *Rogan*, 12 F. Supp. 307 (S. D. Cal.); *Meridian Grain and Elevator Co.* v. *Fly*, 12 F. Supp. 64 (S. D. Miss.); *Henrietta Mills* v. *Hoey*, 12 F. Supp. 61 (S. D. N. Y.); *Louisville Provision Co.* v. *Glenn*, 12 F. Supp. 545 (W. D. Ky.).

ings will indicate that the burden was shifted to others. Accordingly, the statute contemplates comparison of earnings during the tax period with those during a representative period before and after the tax. In the interests of a preliminary simplicity, Section 907 (a) makes a decrease in the processing margin (the difference between the selling price of the article, after deducting the amount of the tax, and the cost of the raw commodity) *prima facie* evidence that the claimant bore the burden of the tax and, correlatively, an unchanged or increased margin *prima facie* evidence that the tax burden had been shifted. However, it is recognized that changes in the gross processing margin might reflect factors other than the tax. Accordingly, Section 907 (e) provides for a refinement or rebuttal of the result obtained under Section 907 (a). Either the taxpayer or the Commissioner may show that the change or lack of change in the margin was due to factors other than the tax. The result is that it is in the power of either the Commissioner or the taxpayer to take account of all factors which enter into the processing margin, and any remaining variation must be due to the only new factor, the processing tax. Such, in over-simplified outline, is the method of proof provided by Section 907. There follows a more detailed summary of its provisions.

Section 907 (a) provides that where the refund claimed is for processing taxes it shall be *prima facie* evidence that the burden of such amount was

borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin during a comparative period before and after the imposition of the tax. Conversely, if the average margin was not lower during the tax period than during the period before and after the tax, it is *prima facie* evidence that none of the burden of such amount was borne by the claimant. The term "tax period" is defined in Section 907 (c) to mean the period with respect to which the claimant actually paid the processing tax to the Collector, ending with the date on which the last tax payment was made. With the exception of tobacco, which does not apply to this case, the term "period before and after the tax" is defined by Section 907 to mean the twenty-four months immediately preceding the effective date of the processing tax and the six months, February to July 1936. The processing tax on cotton became effective August 1, 1933, and the petitioner's complaint shows that the last payment of processing taxes was made May 30, 1935 (R. 3). Hence, in this case the tax period extends from August 1, 1933, to May 30, 1935, inclusive, and the period before and after the tax period is the two years August 1, 1931, to August 1, 1933, and the six months, February to July 1936.

Section 907 (b) (1)–(3) provide for the computation of the average margin for the tax period

and the period before and after the tax. In computing the margin there is deducted from the gross sales value of all articles processed by the claimant for all of the months involved the cost of the commodity processed during those months and the processing tax (if any) paid with respect to such articles. The sum thus ascertained is divided by the number of units of the commodity processed during the period, the units used being those employed in the imposition of the processing tax (in this case pounds of cotton). The term "margin", when used in reference to the tax period thus means the net margin remaining after deduction for the tax.[72a]

The "gross sales value of articles" used in the computation of the margin is defined in Section 907 (b) (6) as the total quantity of each article derived from the commodity processed during all of the months involved, multiplied by the claimant's sale price current at the time of processing for articles of similar grade and quality. But if the claimant's records do not show the actual quantity obtained, he may estimate the quantity by multiplying the quantity of the commodity processed (in this case pounds of cotton) by appropriate conversion

[72a] The language of subdivisions (1) and (2) is apt to be confusing, since they speak of "averages of the margins for all the months", unless it be understood that they must, in view of subdivision (3), refer to weighted averages and that monthly averages are to be used only in connection with determining whether the tax or another increase in cost was shifted to others under Section 907 (e) (1). See Article 605 of Treasury Regulations 96.

factors,[73] giving the quantity of articles customarily obtained from the processing of each unit of the commodity. Section 907 (b) (7). The "cost of the commodity processed", used in the computation of the margin, is defined in Section 907 (b) (5) as (a) the actual cost of the commodity, if the accounting records of the claimant disclose such cost, or (b) the result obtained by multiplying the quantity of the commodity processed by the claimant by the current prices for commodities of like quality and grade which prevailed at the time of processing in the markets where the claimant customarily makes his purchases.

Thus Section 907 creates a presumption that the tax burden has or has not been borne by the claimant, depending upon whether the average margin for the tax period is or is not lower than that during the specified period before and after the tax period. Under Section 907 (e) (1), either the taxpayer or the Commissioner may attack this presumption by showing that the difference in the margin for the two periods was due to changes in factors other than the tax. This proof may include, but is not limited to, proof that there was a change in the type or grade of articles manufactured or in the commodity used in the process of

[73] The statute does not provide that the claimant must use conversion factors established by the Treasury Department. But a table of conversion factors applicable to cotton will be found in T. D. 4433, XIII-1 Cumulative Bulletin 474.

manufacture, or changes in cost of production. See, also, Section 907 (e) (2) dealing with proof such as modification of contracts of sale.

We think it relatively plain that Section 907 provides a basically fair and practicable method by which to determine whether or not a particular processor absorbed or shifted the burden of the tax. In order to avoid further increasing the length of this brief, we shall not enter upon any detailed justification and explanation of its provisions but will merely discuss the specific objections raised by petitioner or by *amici curiae*.

1. The petitioner urges that Sections 907 and 902 impose an impossible burden of proof because they require that the claimant establish the prices which it would have paid for the raw commodity and which it would have received for its finished product had the processing tax not been in effect (Br. 30–39). The short answer to this contention is that the statute makes no such requirement. It merely permits a comparison of the processing margin during the tax period with that during the representative period before and after the tax, with adjustment for any other factor which can be shown to explain the *prima facie* result so obtained. The result reflects any change in earnings attributable to imposition of the processing tax and may be taken to be the practical equivalent of determining whether or not its burden was borne by the processor.

This is a far simpler task than the intricate examination of market forces and trends, such as the demand and supply relationships, which petitioner insists he must prove to recover under Section 907. It must first be noted that so far as these forces and trends are relevant to the claimant, they must necessarily be reflected in the prices and costs considered under Section 907, either in the margin analysis or by way of rebuttal. It is true that the extent to which the imposition of the tax itself affects these forces cannot be isolated. We live, however, in a world of reality, not of abstraction, and tax refund statutes, as taxing statutes, "do not profess to embody perfect economic theory." *Weiss* v. *Wiener*, 279 U. S. 333, 335; *Helvering* v. *Midland Mutual Life Ins. Co.*, No. 257, October Term, 1936. It should be noted in passing that Section 907, in limiting the initial inquiry to the average margin, exposes neither the claimant nor the Commissioner to any very serious inaccuracy. In whatever direction prices in general are moving, they may ordinarily be expected to affect both the price of the raw commodity and of the finished product. The processing margin should not be seriously affected by the price movements which affect both elements of the margin.

With this misconception of petitioner out of the way, the cases of *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, and *Collins* v. *Kentucky*,

234 U. S. 634, have no application. The statute there held invalid made it a crime to enhance the price of harvesters above their "real value", and created a presumption of monopoly whenever a corporation sold goods at a price higher than that at which it would have been sold under free competitive conditions. In contrast to this statute, Section 907 provides for proof of actual and readily ascertainable facts.

Clearly, the processing margins themselves are factors susceptible of proof. The comparison of the margin for the tax period with that for the basic period will create a presumption that the tax burden has or has not been borne by the claimant, depending upon whether or not the margin for the tax period shows a decrease. If it does, the presumption operates against the Government and in favor of the taxpayer. If, however, the margin has not decreased during the tax period a *prima facie* presumption is created that the tax burden has been shifted. Under Section 907 (e) the taxpayer may rebut this presumption by showing that nevertheless he has borne the burden of the tax—that the increase in his manufacturing margin (ignoring the tax) is accounted for by some other cause, as, for example, an increased cost of labor. Obviously the taxpayer knows and can prove whether his labor costs or other expenses of production did in fact increase or

decrease during the tax period.[74] Accordingly, none of the factors involved in Section 907 is inherently incapable of proof.

Petitioner cites (Br. 36–39) various legal and economic authorities to demonstrate that it is impossible to prove whether or not the burden of a manufacturing or processing tax has been shifted. Each of these authorities has reference to an abstract analysis of tax incidence and none purports to state that a concrete examination of the records of a particular taxpayer could not produce a substantially accurate result. Moreover, their statements are directed to the ultimate effect, or final incidence, of the tax; the inquiry answered under Section 907 is not where the final incidence of the tax will rest, but merely whether a given taxpayer succeeded in shifting the burden from himself. It is therefore unnecessary to examine these authorities in detail.

2. The petitioner argues that the presumption arising from a comparison of the processing mar-

[74] In any case where the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, under Section 907 (e) (1) the Commissioner is required to "determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin * * *, and from the general experience of the industry", which item was shifted. If he determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he is required to apportion the change in margin between them.

gins is unconstitutional. There is no controversy as to the legal principles which must govern decision. If the presumption bears no relation to the fact to be proved, the shifting or absorption of the tax burden, it is unconstitutional. *Bailey* v. *Alabama*, 219 U. S. 219, 233–239; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86; *Manley* v. *Georgia*, 279 U. S. 1; *Morrison* v. *California*, 291 U. S. 82; *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639. Similarly, if the presumption is conclusive, it must be held to be invalid. *Heiner* v. *Donnan*, 285 U. S. 312; *Schlesinger* v. *Wisconsin*, 270 U. S. 230. On the other hand, if the presumption is such that there is a rational connection between the facts which raise the inference and the conclusion which is presumed, and if it is capable of rebuttal, the Constitution contains nothing to prevent the legislature from enacting that the inference shall be *prima facie* correct. *United States* v. *Wells*, 283 U. S. 102; *Mobile R. R.* v. *Turnipseed*, 219 U. S. 35, 43; *Yee Hem* v. *United States*, 268 U. S. 178; *Casey* v. *United States*, 276 U. S. 413; *Hawes* v. *Georgia*, 258 U. S. 1; cf. *James-Dickinson Co.* v. *Harry*, 273 U. S. 119.

Petitioner's argument (Br. 40–44) is that the presumption ignores the many factors, other than the cost of cotton, the processing tax, and the selling price of cloth, which affect the processing margin of the cotton mills. This we do not deny. But it seems to us to be thoroughly plain that, since these

factors are generally the most important single items in determining the processor's earnings, they may be taken as a starting point.

Petitioner's argument that any such presumption is arbitrary and capricious arises from its failure to consider the type of presumption created by Section 907 and the nature of the rebuttal allowed under Section 907 (e). The presumption is not a simple presumption of a single fact which may or may not have occurred but a presumption which is a truism. The truism may be paraphrased as follows: All other factors except the tax remaining constant during the tax period and the basic period, the absence of any decline in the processing margin must be attributable to shifting to others the burden of the tax; conversely, a decrease in the margin must be attributable to bearing the burden of the tax. The mathematical figure derived from the comparison of margins on this basis must necessarily show the extent to which the tax burden has been borne, except to the extent that other variables have in fact changed during the tax period.

The presumption established by Section 907 (a) is thus a multiple presumption. Each of the numerous costs of processing such as labor or fuel is presumed to have remained constant. If any of these factors has changed, the taxpayer or the Commissioner may rebut the presumption that it has not changed. After rebutting or accepting each of these individual presumptions, according as costs have or have not changed, and making cor-

responding adjustments of the results obtained under Section 907 (a), the taxpayer or the Commissioner will have shown the actual extent to which the burden of the tax was shifted.

If, for any reason, this marginal approach is unsatisfactory, the taxpayer may, under Section 907 (e), allow for demonstrated error or else adopt any other method of proof more appropriate for the facts of his particular case.

The result thus obtained should approximate exact mathematical accuracy more nearly than formulae employed for purposes of deductions in the revenue laws. See for example Section 114 (b) (3) and (4) of the Revenue Act of 1936 and *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312, 321–322; *Helvering* v. *Ind. Life Ins. Co.,* 292 U. S. 371. In any event it seems impossible that the margin computation could be held to have no rational connection with proof of absorption or shifting the tax burden.

Indeed, a comparison of the margins between selling price of articles and cost of the commodity is a well-recognized means of analysis in the textile industry. Kennedy, *Profits and Losses in Textiles* (1936) states [75] (p. 122):

> The most commonly used index of mill earnings is the gray goods manufacturers' margin or replacement margin, an example of which is shown in Chart II. This margin

[75] The margin referred to is expressed in cents per pound of cotton cloth, while that of Section 907 is expressed in terms of raw cotton. This is, of course, immaterial so far as the reasonableness of the margin comparison is concerned.

> represents the difference between the market price of one pound of some standard construction of gray cloth and the value, at the same or a corresponding time, of one pound of cotton.

Moreover, one of the standard indices of the condition of the textile industry, published by Mr. Alston H. Garside, economist with the New York Cotton Exchange, consists of a weekly average manufacturing margin for representative cotton articles."[*]

Petitioner specifically objects to the presumption based on a comparison of margins because it fails to take into account the possibility of changes in other processing costs (Br. 43–45). It should first be noted that this omission cannot injure the claimant, for he may show these changes under Section 907 (e) and thus modify the result obtained through comparing the margins. The contention thus reduces itself to the assertion that it is irrational to ignore these factors in making the first step which, until explained by further evidence, is *prima facie* evidence of shifting or absorbing the tax burden. So clarified, the contention requires no extended answer. If Congress had required that all of the factors which might affect the processing margin be included, the procedural utility of the

[*] See, for example, Year Book of National Association of Cotton Manufacturers, 1925, p. 214; 1926, p. 142; 1927, p. 155; 1928, p. 166; 1929, p. 186; 1930, p. 141. See also Weekly Basic Data Reports of the New York Cotton Exchange Service.

presumption would wholly be lost. While the textile industry had increased labor costs, other industries to which the Title applies did not (see, for example, the margins for wheat and hogs shown in Appendix B, *infra*, p. 188), and it is unlikely that the increased labor costs affected all cotton processors uniformly. Other industries may be expected to have had their own peculiar variations in processing costs during the tax period. We can see nothing unfair, arbitrary, or irrational in permitting inquiry into these circumstances to be avoided if neither the Commissioner nor the claimant believe the other factors have changed sufficiently to alter the result.

In any event, the processing tax more than any other cost of processing was regarded by the textile industry as the equivalent of an increase in price of the raw cotton.[17] Petitioner does not deny that the price of raw materials is the first of all costs to be shifted by the processor, since it affects all processors indifferently. So, too, would the processing tax tend to be shifted before any other processing cost. It results, if the margin were not decreased, that the processing tax might reasonably be assumed to have been shifted irrespective of the possibility of changes in other costs.

[17] See, for example, *Joint Statement of Cotton Textile Institute and the Cotton Textile Code Authority*, Daily News Record, May 4, 1935, p. 8; Wall Street Journal, April 5, 1936, p. 4.

Petitioner quotes several publications of the Department of Agriculture as authorities for the proposition that a change in margins furnishes no evidence that the tax burden has been shifted. The *Report of the Chief of the Bureau of Agricultural Economics*, 1935 (Br. 43) states that since 1934 there have been changes in the "margin between prices received by the *farmers* and the prices paid by *consumers.*" Even if the quotation referred to the *processor's* margin alone, we should agree. The *Report of the President's Cabinet Committee on the Textile Industry*, Sen. Doc. No. 126, 74th Cong., 1st Sess., p. 142 (Br. 43) states that a fixed margin does not obtain and that the effect upon selling price of a single element of cost cannot be disentangled. The *Report of Administration of Agricultural Adjustment Act, May 1933 to February 1934*, pp. 220, 236, states that a comparison in the change of prices cannot show "who pays the processing tax" and that margins were changing in the textile industry. With all of this we agree. It is, however, important to note several things. (1) These publications were speaking of the industry as a whole and not of an examination of the records of a particular processor. (2) Because processing margins in fact change because of factors other than the tax does not make unreasonable or irrational a preliminary assumption that the tax is responsible for the change, or that it was the first of the changed costs to be shifted. (3) The statements were concerned with

the ultimate incidence of the tax, as between producer, processor, distributor, retailer, and consumer. Title VII is concerned only with whether or not the particular processor bore this burden of the tax.

There remains only petitioner's objection that the presumption is in fact conclusive (Br. 47). The argument emphasizes the language of Section 907 (e) which provides for rebuttal by showing "the actual extent" to which the tax burden was shifted, and relies on the premise, earlier shown to be erroneous (*supra*, pp. 145–148), that under Sections 902 and 907 the taxpayers must show what the prices of raw commodities and finished articles would have been had there been no tax. But we have already demonstrated that Section 907 (e) (1) merely provides for refinement of the rough results reached under the presumption, and we do not understand that petitioner denies that rebuttal evidence of this nature may easily be proved.

3. Petitioner also argues that both Section 902 and 907 are arbitrary and unconstitutional because of their failure to take into consideration the consequential losses suffered by processors because of the imposition of the processing tax (Br. 58–61). Such, too, is the argument of *amici curiae* (Mr. Buckingham, pp. 13–15; Mr. Barker, pp. 4–5).

It should be noted at the outset that this argument contradicts the implication of petitioner's earlier argument (Br. 43–45) that the increased price of cotton cloth may well be traced to factors other than the processing tax. If it is said

to be arbitrary to raise a presumption that a rise in the processing margin is due to the tax, we do not see that petitioner can at the same time object that the increase in price, resulting in hypothetically lowered sales, caused the processors losses which can be traced to the tax.

However this may be, petitioner's argument is contrary to fact. There is no contention that the processors did in fact suffer a loss in volume. Petitioner's tax payments indicate that its volume in ~~example, the margins for wheat and hogs shown in Ap-~~ cotton mills actually increased during the period of the tax.[78] During the two years prior to imposition of the tax on August 1, 1933, cotton consumption by American mills averaged 458,000 running bales, while during the period of the tax it averaged 465,000 running bales per month.[78] We do not see that, in the face of an actual expansion in production, petitioner can ask that an Act of Congress be declared invalid because it fails to recognize the consequences of a curtailed production.

Of course it is not denied that, if there had been no processing tax, and if the market forces had been the same as though there were no tax, the sales of cotton cloth would have been larger. For the burden of the processing tax on cotton was generally passed on to the consumer (as petitioner admits in making this argument) and we may sup-

[78] Computed from data published in *Cotton Production and Distribution*, issued periodically by the Bureau of the Census, Department of Commerce.

pose that the additional price limited the purchases which otherwise would have been made. But if we are to consider some of the indirect consequences of the imposition of the processing taxes, we must take into account all of these consequences. Without entering into an attempt to estimate their economic wisdom or their precise effect, the payment of benefits to farmers under the Agricultural Adjustment Act was one of the measures adopted in 1933 to restore the equilibrium of our economic system of production and exchange. With the restoration of this balance, employment was expanded by the resumption of productive activity, leading to increased factory pay rolls and thus to stimulated consumer demand.[79] The increased expenditures of farmers, not only for cotton goods but also for a wide variety of commodities, may well have stimulated an expansion in urban employment and pay rolls by amounts much in excess of the benefit payments involved. The indirect effects of the processing taxes, instead of being detrimental to cotton processors through a decline in consumption, seem actually to have been advantageous to them, as seen in the demonstrated fact of increased consumption.

In view of the diverse and balancing effects of these various economic factors we submit that it was wholly fair to omit them from consideration in

[79] For a thorough treatment of this widely accepted economic principle, see B. M. Anderson, Economist for the Chase National Bank, *Equilibrium Creates Purchasing Power*, Chase Economic Bulletin, June 12, 1931.

establishing the methods of proving absorption or shifting of the tax burden. That it would have been thoroughly impractical to take them into account goes without saying, and we have already shown (*supra*, pp. 145–148) that Congress need not take into consideration the remote and incalculable effects of changing market forces.

In any event, petitioner's argument is conclusively answered by *United States* v. *Jefferson Electric Co.*, 291 U. S. 386. For whether or not the Court in that case considered only a tax passed on as a separate item, the effect in reducing sales was the same as that of the Agricultural Adjustment Act taxes. If the Constitution did not require allowance for the reduced sales in that case, it cannot do so here.

4. Petitioner also objects (Br. 45–47) that Section 907 provides an unfair comparative period, in that the margin during the tax period is compared with a period taken at the lowest ebb of the depression. The basic period applicable to this case is the two years, August 1931 through July 1933, and the six months, February 1936 to July 1936, inclusive. It is obvious that the petitioner's statement is not true as applied to the last six months. We concede that the balance of the period was a depression period, but the processing taxes were initiated during that period and it hardly can be said to be unreasonable to make a comparison of the tax period with the period immediately before and after the tax. The factors other than the processing tax would have changed to a smaller

degree than if the comparison were with the more remote years of continuous business prosperity.

This is especially true of the cotton-textile industry, as may be seen from a glance at the trend of the processing margin over past years, shown in the chart reproduced above (p. 86). It will be seen that from a level of around 17 cents per pound in 1925, the cotton processing margin on 17 typical constructions of cloth declined steadily, until in early 1933 it had sunk to about 9 cents per pound. This steady and pronounced fall in the processing margin was the result of adjustments in competitive prices due to technical improvements in spinning and weaving, and to geographical shifts in the industry affecting costs. Since there has been this definite and long-continued change in what must be considered as the normal processing margin in cotton processing, it would be palpably misleading to insist upon comparisons between periods too far removed from each other.

Petitioner also urges that it is unreasonable to employ this short comparative period in Title VII of the Revenue Act, when Title III, imposing a tax on unjust enrichment, employs, for substantially the same purpose, a six-year period before the tax. This difference in the comparative periods may be explained not only by the different legislative history of the two titles,[80] but by the fact that in Title

[80] Title VII was not in the bill which became the Revenue Act of 1936 when it passed the House but, in contrast to Title III, was contained in a bill to amend administra-

III it was impossible to use the six month period after invalidation of the processing tax. Under Section 501 (c) and (e) the comparison was made on a basis which includes, in the second alternative, data based on the entire taxable year in which were sold the articles with respect to which a tax was imposed but not paid. This taxable year would for many taxpayers include the six months February to July 1936. It is plainly illogical that the same six months should be used in both comparative periods. Thus, it was necessary to extend the pre-tax period back farther than two years in order to provide a fair comparison. Whether or not the additional four years does more than to offset this is irrelevant to the constitutional power of Congress.

The quotations (Br. 46) from the Senate report and from a Government brief on Title III in a lower court, which emphasize that Title III, through the length of its comparative period, is wholly fair to the taxpayer, do not mean that a shorter period would be unfair. Fairness is a matter of degree, and laws relating to taxes are not known for their consistency in this regard.

5. A brief *amicus curiae* (Mr. Barker, pp. 11–17) urges that Title VII must be declared unconstitutional because it contains a faulty definition of the "cost of the commodity" and the "gross sales value

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tive provisions of the internal revenue laws (H. R. 12793, 74th Cong., 2d Sess.) which was reported to the House (H. Rpt. No. 2818) but never passed.

of articles" in Section 907 (b) (5) and (6) (*infra*, p. 175). Passing the obvious thought that this is a rather small peg on which to hang so weighty a demand as to declare the whole of Title VII invalid, we submit that the objection is misfounded.

To permit Title VII to operate both in industries where books were kept on a basis which reflected the actual cost of the specific lot of commodity processed and in those where stocks were intermingled and the cost taken to be the market price at the time of processing, Congress provided that either method could be used. We see nothing but plain sense and elementary fairness in this provision. The brief presents hypothetical examples of processors, otherwise similarly situated, which appear to show alarming divergences.[81] Were we to engage in a war of hypotheses, we could, of course, present examples where the result would be precisely the same. But, without losing sight of the exaggerated character of the hypothetical examples, and if we, in turn, may propose our conjectures, it seems that the books of the two processors would probably show substantially the same cost. Any processor who bought his cotton so far in advance may probably be expected to "hedge" his purchase. Garside, *Cotton Goes to Market*, p. 326. The rise in price of cotton held for processing would be balanced by a loss on the cotton sold on the exchange for future delivery; this loss, in coun-

[81] As a matter of fact, of course, most processors in any given industry keep their books on the same basis.

sel's examples, would probably enter into the "actual cost" of the commodity.

Section 906 (b) (6) provides that sales price shall be measured by current prices at the time of processing. Counsel finds this arbitrary, since it is elementary that a tax cannot be shifted until the article is sold. But if the processor were building up an inventory of finished goods, he may be supposed, in the light of common practice in the industry, to hedge by selling cotton futures, so that the actual net sale price would be very close to that prevailing on the date of processing. But the conclusive answer is that, if a case such as counsel pictures should arise, we see no reason why these facts would not of themselves constitute a rebuttal of the presumption arising from the margin comparison. Section 907 (e) permits any type of rebuttal.

We therefore submit that Section 907 provides a fair and practicable method of determining whether or not the burden of the processing tax was borne by the processor. It does "not profess to embody perfect economic theory" and may possibly ignore "some things that * * * a theorist * * * would take into account," such as the precise balance between the effect of benefit payments in increasing demand and that of the processing taxes in raising prices. But the Constitution does not demand an impossible perfection in tax laws. *Weiss* v. *Wiener,* 279 U. S. 333, 335; *Helvering* v. *Midland Mutual Life Ins. Co.,* No. 257, October Term, 1936. We also

admit that an absolute and theoretically perfect precision of analysis of the extent of tax absorption will probably not always be obtained in practice. The accounting and economic problems in some cases will be complex and difficult. But this cannot serve to strike down an act of Congress as unconstitutional. However, we entertain no doubt but that "fair and reasonable approximations" can be reached in every case. The Constitution requires no more. As this Court said in *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 190–191:

> Undoubtedly, the administration of an act like this one is attended with some difficulty. Measurements and calculations are more or less complicated. Absolute precision in either probably cannot be attained; but that is so to a greater or less degree in respect of most taxing laws. If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence, depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations. Compare *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 150; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563–566; *Commonwealth* v. *People's Five Cents Savings Bank*, 87 Mass. 428, 436.

We wish again to emphasize that all discussion of Section 907, whether by petitioner, *amici curiae*, or in this brief, has to a greater or less degree been conjectural. But if this Court should feel that the constitutionality of the provisions of Section 907 should be determined on this record, we submit that it meets every requirement of the Constitution.

CONCLUSION

For the reasons which have been set out in this brief, we believe that the District Court was without jurisdiction to entertain this suit. If this Court should feel obliged to look beyond these basic barriers to petitioner's suit, we submit that Title VII of the Revenue Act of 1936 meets every requirement of the Constitution and of fair dealing to the taxpayers. We therefore respectfully submit that the decision of the court below should be affirmed.

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MARCH, 1937.

APPENDIX A

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to

which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury De-

partment as may be necessary to perform its functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an officer or employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented by counsel, to have witnesses subpenaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpena, signed by any member of the Board, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, records, correspondence, memoranda, and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommenda-

tions may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure

to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken, and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period

than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown

by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity or commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may

determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initia-

tion, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

SEC. 910. LIABILITY OF COLLECTORS.

No collector of internal revenue or customs, or internal revenue or customs officer

or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government.

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(c) The term "commodity" means any commodity, prior to processing, of a type with respect to the processing of which a processing tax was imposed under the Agricultural Adjustment Act.

(d) The term "article" means the product which is obtained by processing a commodity, and includes the product obtained by further manufacture or by combination with other materials.

(e) The term "refund" includes any recovery, recoupment, set-off, credit, or counterclaim.

(f) The term "Agricultural Adjustment Act" means the Agricultural Adjustment Act as originally enacted and the amend-

ments thereto adopted prior to January 6, 1936.

Revised Statutes:

SEC. 3220. [As amended by Sec. 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 115, and Sec. 619, of the Revenue Act of 1928, c. 852, 45 Stat. 791, 878.] Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section (U. S. C., Title 26, Sec. 1670–1671).

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court (U. S. C., Title 26, Sec. 1543).

SEC. 3226. [As amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286, and Sec. 807 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, 1745.] No suit or proceed-

ing shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun. (U. S. C., Title 26, Secs. 1672–1673).

SEC. 3228. [As amended by Sec. 1112 of the Revenue Act of 1926, Sec. 619 of the Revenue Act of 1928, and Sec. 1106 of the Revenue Act of 1932.] All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected with-

out authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceeding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

* * * * *

(U. S. C., Title 26, Sec. 1433.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 768, 771:

SEC. 21. (d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or in-

directly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such

holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the pay-

ment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by the act of May 9, 1934, c. 263, 48 Stat. 670; the act of March 18, 1935, c. 32, 49 Stat. 45; and the act of August 24, 1935, c. 641, 49 Stat. 750.

Sec. 9 (a):

To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation * * *. The processing tax shall be levied, assessed, and collected upon the first

domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture * * *.

Sec. 9 (d) (2):

In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term "cotton" shall not include cotton linters.

Sec. 16 (a):

Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (includ-

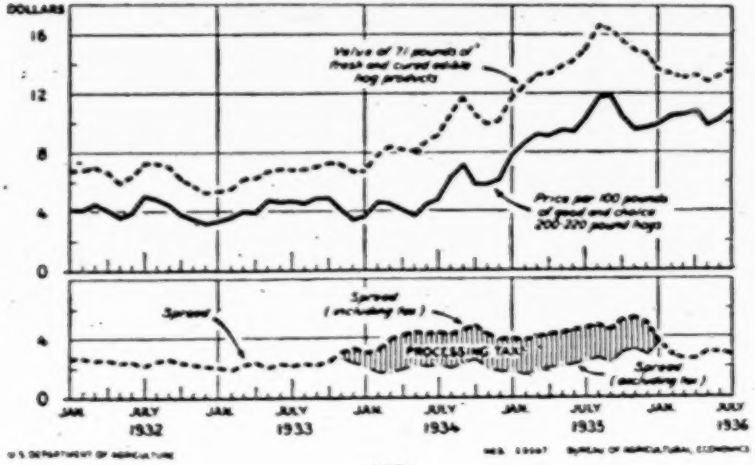
ing articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. Such tax upon articles imported prior to, but in customs custody or control on, the effective date, shall be paid prior to release therefrom. In the case of sugar, the tax on floor stocks, except the retail stocks of persons engaged in retail trade, shall be paid for the month in which the stocks are sold, or used in the manufacture of other articles, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

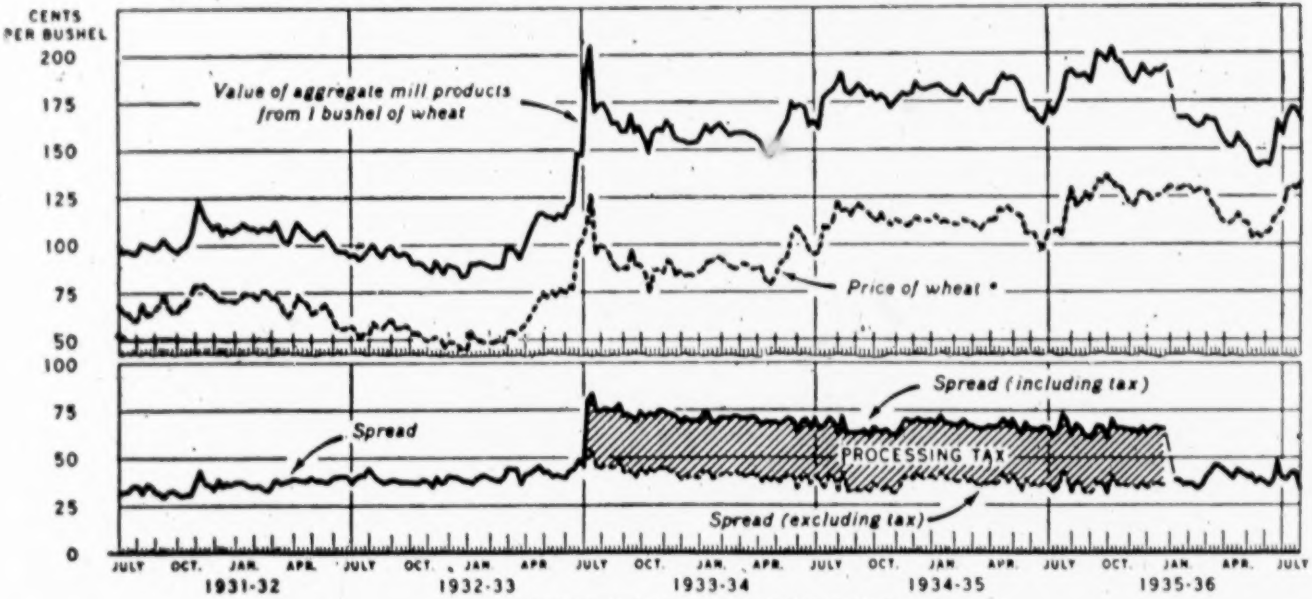
APPENDIX B

Charts prepared by Bureau of Agricultural Economics, Department of Agriculture. Printed at p. 865 of Hearings on H. R. 12395 (Revenue Act of 1936) before Senate Committee on Finance, 74th Cong., 2d sess.

PRICE OF HOGS AND WHOLESALE VALUE OF HOG PRODUCTS, CHICAGO, AND SPREAD BETWEEN PRICE AND VALUE, JAN. 1932 - JULY 1936



PRICE OF WHEAT AND WHOLESALE VALUE OF MILL PRODUCTS, AND SPREAD BETWEEN PRICE AND VALUE, MINNEAPOLIS, JULY 1931-36



*NO. 1 DARK NORTHERN SPRING (15 PERCENT PROTEIN)

U.S. DEPARTMENT OF AGRICULTURE

NEG. 20823 BUREAU OF AGRICULTURAL ECONOMICS

APPENDIX C

DETERMINATION OF TAX SHIFTING UNDER SECTION 907

The following oversimplified example is intended to be illustrative only:

1. Number of pounds of cotton processed during period before and after tax (Sec. 907 (b) (2) and (3) and (c))	1,000,000
2. Total cost of this cotton (either actual cost or current price at time of processing) (sec. 907 (b) (5))	$100,000
3. Number of pounds of sheeting manufactured from this cotton, neglecting by-products (Sec. 907 (b) (6) and (7))	900,000
4. Total selling price (current price at time of processing) (Sec. 907 (b) (6))	$300,000
5. Item 4 minus item 2 (Sec. 907 (b) (2) and (3))	$200,000
6. Average margin during period before and after tax (item 5 divided by item 1) (Sec. 907 (b) (2) (3) and (c))	$0.20
7. Number of pounds of cotton processed during tax period (Sec. 907 (b) (1) (3) and (c))	1,500,000
8. Total cost of this cotton (either actual cost or current price at time of processing) (Sec. 907 (b) (5))	$180,000
9. Number of pounds of sheeting manufactured from this cotton (Sec. 907 (b) (6) and (7))	1,350,000
10. Total selling price (current price at time of processing) (Sec. 907 (b) (6))	$573,000
11. Amount of processing tax per pound of cotton (Sec. 907 (b) (1) and (3))	$0.042
12. Total amount of tax paid (item 7 times item 11)	$63,000
13. Item 10 minus the total of items 8 and 12 (Sec. 907 (b) (1) and (3))	$330,000
14. Average margin during tax period before and after tax (item 13 divided by item 7) (Sec. 907 (b) (1) and (3))	$0.22

Since the average margin was not lower during the tax period than before, *prima facie* the taxpayer shifted the burden of the processing tax.

---

15. The claimant rebuts (Section 907 (e) (1)) by showing increased labor costs, per pound of sheeting, of	$0.03
16. This is equivalent, per pound of cotton (multiplying item 15 by the quotient of item 9 divided by item 7), to	$0.027
17. The Commissioner shows (Section 907 (e) (1)) a fuel saving amounting, per pound of sheeting, to	$0.002
18. This is equivalent, per pound of cotton (multiplying item 17 by the quotient of item 9 divided by item 7), to	$0.0018
19. The margin during the tax period should thus be reduced by (item 16 minus item 18)	$0.0252
20. Average margin during tax period after adjustments for charged costs (item 14 minus item 18)	$0.1948
21. The claimant bore the burden of the tax, per pound of cotton, to the extent (item 6 minus item 20) of	$0.0052
22. Total amount of tax burden borne by claimant (item 21 times item 7)	$7,800

The claimant would thus be entitled to a refund of $7,800. The actual claim, while using period totals, would also include monthly margin computations. Section 907. This would permit the Commissioner, under Section 907 (e) (1) to ascertain if the increased labor or decreased fuel costs were actually reflected in the margin, or to check the margin behavior against the sales practices of the claimant as indicated in Section 907 (e) (2); in this illustrative example we assume that the Commissioner determines that those cost charges were actually reflected in the margin.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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IN THE

Supreme Court of the United States

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AMICUS CURIAE.

WILLIAM B. MCILVAINE,
120 West Adams Street,
Chicago, Illinois,
Amicus Curiae.

THE DONNELLEY-WARREN PRINTING COMPANY, 310 WEST ADAMS, CHICAGO

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IN THE

Supreme Court of the United States

No. 667.

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

BRIEF FILED BY THE UNDERSIGNED IN SUPPORT OF PETITION FOR CERTIORARI OF ANNISTON MANUFACTURING COMPANY.

I respectfully request the court to grant the Petition for Certiorari filed by Anniston Manufacturing Company, Petitioner, in the above entitled cause for the following reasons:

1. If the opinion of the Court of Appeals for the Fifth Circuit is a true interpretation of the law, then taxpayers whose taxes are paid are no longer protected by the Fifth Amendment to the Constitution in any case.

2. With respect to all new taxes imposed, the only recourse of the taxpayer will be by way of injunction. The system of corrective justice which has been established by payment of taxes first and refunds afterward will be completely broken down; great additional burdens will be placed upon the taxpayers; and the Government will be deprived, or delayed in collecting, a great amount of revenue.

In support of the foregoing statements, we submit the following:

The principal part of the opinion of the Court of Appeals in the above entitled cause is directed to a consideration of whether or not the action brought against the Collector is a suit at common law or is a statutory suit really against the United States.

The court has devoted a part of the opinion to the question of whether or not the 1936 Act is in conformity with due process of law. But no opinion is expressed on this fundamental issue. For after the statement made on this subject, the court then says that "We are persuaded that we should not enter upon either a discussion or a decision of" this subject "for we are convinced that appellants have failed to establish their first point, to which the second, which they and appellee so fully discuss, is completely subordinate, that the suits they seek to maintain are really personal suits against the defendant, at common law, to enforce vested rights against him as an individual, and not suits against the United States, consented to by it through the fiction of a suit against the collector."

It is possible that the Court of Appeals thought that the question of whether or not the 1936 law is consistent with the Fifth Amendment, should be presented in a suit brought pursuant to the provisions of the 1936 law. But this is not even intimated in the opinion and it could hardly have been in the mind of the court because, under the 1936 Act, no suit can be brought except upon a claim for refund previously filed as described in that act. Such claims for refund are limited to the type of claim provided in the 1936 Act. Any taxpayer suing under that act must sue upon a limited claim showing the extent to which he has "passed on" the tax, either directly or indirectly. The taxpayer under the 1936 Act is not allowed to sue for the entire claim. Any claim

which the taxpayer files under the 1936 Act would not be consistent with the Act of 1936 if he sued for the entire claim alone. Therefore the unconstitutionality of the 1936 Act is properly presented in the above entitled cause.

So that the whole effect of the opinion is that, by statute, Congress has changed a suit against the collector into a suit against the United States; that the United States being a sovereign, has the right to withdraw its consent to be sued; and that therefore this suit cannot be maintained because that consent has been withdrawn.

It must be remembered that when the taxes in question were paid the taxpayer had no right to obtain an injunction against their payment because the statutes then provided that no injunctions could be obtained for the reason that if taxes were illegally or erroneously collected, the taxpayer had a complete remedy by way of a complete refund. If the taxpayer had asked for an injunction on the ground that Congress might later withdraw its right to be sued, the theory would have been fantastic and the injunction denied.

If Congress should now pass an act withdrawing its right to be sued for the refund of taxes, then as to all future tax collections, courts must hear taxpayers on bills for injunction; but, as for all taxes previously paid, the taxpayer would be without remedy in spite of the fact that, when taxes were paid, provisions for refund were assured to him.

Congress has recently enacted the Social Security Act which, in certain parts, imposes large taxes on employees and employers for old age pensions and unemployment insurance. Under the Social Security Act and the general acts of Congress with reference to refunds and against injunctions, taxpayers are assured their day in court as to

the general legality of these acts and as to their application to particular taxpayers under and by virtue of the provisions for refund which are assured to them without qualification. These taxes so imposed under the Social Security Act are being collected and are being paid by taxpayers (both employees and employers) on the faith of these statutes. But, if the opinion in this cause should be sustained, then all such taxes would be paid at the taxpayer's risk; for Congress could pass an act prohibiting *all refunds*, whether in suits against collectors or against the United States, and the protection of the Fifth Amendment, which provides that no property shall be taken without due process of law, would be completely evaded and made of no effect.

In view of the huge sums now in process of collection, not only under the Social Security Act but under all forms of taxation and being paid by the taxpayers in reliance upon the right of refund for taxes illegally or erroneously collected or assessed, the seriousness of this situation should be apparent to the court.

In the early days, before the system of refunds was established, the acts of Congress for excise and other taxes provided taxpayers a day in court as to the legality or erroneous assessment of taxes *before* the taxes were collected. This has been pointed out in the case of *Phillips* v. *Commissioner*, 283 U. S. 589, at page 595 (footnote). It is there also said, pages 595-597:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. *Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights*, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare *Cheatham* v. *United States*, 92 U. S. 85, 88-89; *Springer* v. *United States*, 102 U. S. 586, 594; *Hagar*

v. *Reclamation District No. 108*, 111 U. S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, *United States* v. *Woo Jan*, 245 U. S. 552; *Ng Fung Ho* v. *White*, 259 U. S. 276, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue.

* * * * * *

"Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate. Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Rowland*, 196 U. S. 611, 631. * * *" (Italics ours.)

It will be noticed in the foregoing case that the Supreme Court had in mind *the total effect of the Fifth* Amendment which provides that no person shall be deprived of life, liberty *or property* without due process. It further recognizes that in cases of personal liberty the defendant is granted an earlier hearing than in the taking of property. *But the right to a hearing is guaranteed by the system of refunds in all tax cases.* Without this guaranty, where adequate opportunity is afforded for a later judicial determination of legal rights, those legal rights must be granted *before* the taxpayer is deprived of his property.

Also, in all of the following cases, the Supreme Court has recognized the right of the government to take property for taxation in advance of a determination of the validity of the taking; but, by providing for unqualified refunds, has established a *system of corrective justice* which adequately complies with the Fifth Amendment to the Constitution:

State Railroad Tax Cases, 92 U. S. 575, 613.

Snyder v. *Marks*, 109 U. S. 189.
Dodge v. *Osborne*, 240 U. S. 118.
United States v. *Jefferson Electric Co.*, 291 U. S. 386, 395-396.

It must also be noticed that it has been specifically held by the Supreme Court that, with respect to the collections *and refunds* of taxes, the law must comply with the Fifth Amendment to the Constitution, *and that the authority of Congress to withdraw the consent of the United States to be sued is no adequate argument.*

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, the court had under consideration the validity of Section 607 of the Revenue Act of 1928 which provided that taxes assessed or paid after the period of limitation should not be refunded to the taxpayer where the taxpayer had filed a claim in abatement or the collection of the tax had been stayed. The court tested this act under the due process clause and held it valid but then said, pages 430-431:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen & Company, supra*, at p. 391. The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal and not against the United States. *Sage* v. *United States*, 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1, 4, 5. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, *it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.* See *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 679, 680."

To the same effect was *United States* v. *Jefferson Electric Company*, 291 U. S. 386 at 403, citing the foregoing case.

This is a suit against the Collector: "The one who committed the wrong"; the one who, in the case of *Rickert Rice Mills Company* v. *Fontenot*, 297 U. S. 110, this court held to be a trespasser. In the foregoing case and in the following cases, the Supreme Court has recognized that suits against collectors are personal actions and not governed by the same rules as suits against the United States:

Sage v. *United States*, 250 U. S. 33, 37.
Smietanka v. *Indiana Steel Co.*, 257 U. S. 1.
Union Trust Co. v. *Wardell*, 258 U. S. 357.
Levy v. *Wardell*, 258 U. S. 543, and
Bonkers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 398.

It should also be noticed that Title VII of the Act of 1936 on which the Government relies is not merely an attempt to withdraw the right of the United States to be sued. The sections relating to that subject are inseparably connected with the other parts of the statute; so that the total effect of the act is to deny the fundamental right of the taxpayer to a refund of the taxes paid. The United States can take the property of a taxpayer in advance of a judicial determination as to the right of taking *only because and if a system of corrective justice has been worked out which preserves that right intact and gives the taxpayer substantially the same remedy that he would have if the judicial determination were made in advance of taking.*

If this were not true then, as above stated, no taxpayer is safe in paying any taxes. And if the opinion of the Court of Appeals in the case at bar represents the law, then the entire system upon which taxpayers have constantly relied and by which the government has supported them for many years is *destroyed.*

It will be noticed that we are not here urging that for these reasons the Act of 1936 is necessarily unconstitutional. Our only point is that the Act of 1936 must be tested under the due process clause of the Constitution just as the Act of 1928 was tested in the case of *Graham & Foster* v. *Goodcell*, 282 U. S. 409, and that the theory of the government that the right of a sovereign to determine when it shall be sued *is not conclusive.*

For the foregoing reasons, we submit that the court should take the above entitled cause and should then consider whether or not the 1936 Act complies with the Fifth Amendment to the Constitution. In so doing, the court should direct its attention to the following points.

1. The Act of 1936 is retroactive in character and deprives the taxpayer of a vested right.

2. The Act of 1936 is not a provision for refunds but a provision for the denial of refunds. It provides for no refunds except to the taxpayer. Those who have paid the taxes to the taxpayer in the price of goods or by special agreement, *are deprived of all remedy.* If Congress was right in thinking that practically all of the Agriculture Adjustment Act taxes were "passed on," then the Act of 1936 is a mere attempt to retain in the Treasury practically all of the A. A. A. taxes and to *grant practically no refunds to any one.* This is a material distinction between the Act of 1936 and the act before the court in *United States* v. *Jefferson Electric Company*, 291 U. S. 386 where the Act under consideration *provided for a refund of all taxes* illegally collected and merely that certain refunds should be paid to a third person.

3. The Act of 1936 is a substantive amendment of a tax law (which was unconstitutional) changing that law (in effect) into a tax on the consumer, and then denying him a remedy.

4. The system of refunds which is provided for in the

1936 Act provides for inequality among taxpayers and is therefore invalid.

5. The 1936 Act bases the test of refund on subject matter which does not relate to the passing on of the tax and is therefore invalid.

6. The 1936 Act is based upon an economic theory which has been rejected as inconsistent with the law. (*Lash's Products Co.* v. *United States*, 278 U. S. 175; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531; *Liggett & Myers Tobacco Co.* v. *United States*, United States Supreme Court, Opinion of January 4, 1937; and *Brief for Government* filed in said cause.)

7. Proof required for refunds under the 1936 Act is based upon assumptions which are impossible to make as in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216.

Respectfully submited,

WILLIAM B. MCILVAINE,
As Amicus Curiae.

I hereby certify that the written consents of Messrs. Sutherland, Tuttle & Brennan, First National Bank Building, Atlanta, Georgia, and of the Solicitor General of the United States have been filed with the Clerk of this Court.

WILLIAM B. MCILVAINE.

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BRIEF OF AMICUS CURIAE.

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IN THE

Supreme Court of the United States

No. 667.

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI OF ANNISTON MANUFACTURING COMPANY.

The undersigned, as *amicus curiae*, respectfully requests the court to grant the Petition for Certiorari filed by Anniston Manufacturing Company, petitioner in the above entitled cause, for the following reasons:

I. Because of the social and economic desirability of a final decision of the questions involved.

II. Because of the great importance of the questions of law presented.

I.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SOCIAL AND ECONOMIC DESIRABILITY OF A FINAL DETERMINATION OF THE QUESTIONS INVOLVED.

This suit is one of more than 200 suits, which have been brought to obtain a refund of floor stock, processing or compensating taxes collected under the pretended authority of the Agricultural Adjustment Act, approved May 12, 1933, which was declared invalid by this Court January 6, 1936. The total amount of taxes collected under that Act aggregated several hundred million dollars; in fact, there was exacted from the taxpayer by whose attorney this brief is filed more than $11,000,000.00. Since a decision in the instant case will probably determine whether or not the 73,000* taxpayers who paid processing taxes and the many more who paid floor stock taxes will recover a substantial portion of the moneys exacted from them, the importance to these taxpayers of a review by this Court of the decision of the Circuit Court of Appeals for the Fifth Circuit can not be over-estimated.

Denial of the petition, will, of course, necessitate the continued prosecution of these 200 pending suits with great expense both to the claimants and the Government. It will leave the Government and taxpayers under the necessity of incurring large expense in attempting to solve the difficult questions of fact presented by Title VII, all of which expense will have been wasted if Title VII is later held unconstitutional. It will leave many claimants with their balance sheets unsettled and with business plans necessarily uncertain.

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* Report of House Committee on Ways and Means to accompany H. R. 12793 (74th Congress, 2nd Session).

In the lower Federal Courts the greatest confusion prevails as to the validity of this Title. Thus, the District Judge for the Eastern District of Virginia, in the case of *Priddy and Company, Inc.* v. *Early, Collector*, has declared the entire Title to be unconstitutional and void, citing some twenty-one grounds of invalidity. Likewise, the Judge of the District Court for the Eastern District of Wisconsin, in the case of *Cudahy Brothers Co.* v. *La Budde, Collector*, has declared Title VII invalid, in denying the Government's motion to dismiss in several related cases. Neither of these decisions was made on written opinion. On the other hand, motions to dismiss filed on behalf of the collectors have been granted in a number of cases.

Not only in the Federal District Courts is there opinion that the refund procedure established by the Revenue Act of 1936 is invalid. Thus, in the case of *Marshall Field & Co., Inc.* v. *United States*, (U. S. Customs Court, Second Division, December 16, 1936), the United States Customs Court, in a written opinion, has held the whole of Title VII unconstitutional.

In view of the great amount of money involved and the number of persons affected, the economic desirability of a prompt determination of the questions raised, and the contrariety of opinion prevailing in the lower Federal Courts it is suggested that this Court should grant the pending petition for certiorari.

II.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE OF THE GREAT IMPORTANCE OF THE QUESTIONS OF LAW PRESENTED.

A. *Factual Situation.*

The basic facts common to all of the 200 cases now pending are as follows:

First, the collector of Internal Reenue under the duress of inevitable distraint, exacted and collected from the taxpayer various sums of money as so-called processing taxes. The exaction was under the provisions of the Agricultural Adjustment Act. These taxes were mere illegal impositions, as decided by this Court in *United States* v. *Butler*, 297 U. S. 1, and *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110.

Secondly, in each case the taxpayer filed with the Collector of Internal Revenue its claim for refund. The law as it stood when the claim was filed required the taxpayer to show to the Commissioner two facts, and no others, viz., (a) that the exaction was illegal; and (b) that the taxpayer paid the money. Accordingly the claim for refund filed by the taxpayer showed these two facts in the form then provided by the applicable Regulations.

Thirdly, the Commissioner of Internal Revenue formally rejected the taxpayer's claim upon the ground that the exaction was *not* illegal.

Fourthly, upon this rejection, the taxpayer had the right to sue, and did sue, the Collector, and on showing to the Court these two facts, and no others, was *then* entitled to a judgment *for the full amount exacted from him.*

(As the law then stood, no valid defense could have then been interposed by the collector.)

Fifthly, all of these things occurred before the enactment of the Revenue Act of 1936, which became effective July 22, 1936.

Title VII of that Act provides in substance:

(1) That no taxpayer can recover any amount of so-called processing taxes until (wholly disregarding the previous claim to the Commissioner, the Commissioner's rejection of that claim and the pending suit), the taxpayer files a *new* claim with the Commissioner *after* July 22, 1936, and before July 1, 1937; proving on such new claim to the satisfaction of the Commissioner (a) that the exaction was illegal; (b) that the claimant paid the money; and in addition (c) *that the taxpayer and no other person bore the economic burden occasioned by having paid the tax, and that the taxpayer did not in any manner by his operations in the processed article, reimburse himself for the money he paid out;*

(These additional facts are required to be proved, notwithstanding that the taxpayer never collected any amount from anyone *as a tax*, and made no contract or agreement with anyone concerning such a *tax*, but merely sold his product at a sales price, which the purchaser paid to get the goods.)

(2) that if and when the taxpayer establishes to the Commissioner's satisfaction the additional facts required, he will be entitled to a refund—not of *all* the money he paid the collector, but only of that portion of the money so paid, the ultimate *economic burden* of which was not *ultimately* borne by some one other than the taxpayer;

(3) that if the Commissioner decides against him, or makes no decision within two years, the taxpayer can appeal to a special board established by Title VII, where the same proof of additional facts is required;

(4) that after its adverse decision (which may require another period measured in years), taxpayer can appeal to the appropriate United States Circuit Court of Appeals, where proof of the same additional facts is required, and in proof of which facts, no new or independent evidence can be heard;

(5) that until this departmental procedure is completed, after the lapse of some years, no suit can be maintained to recover such processing tax, or any part thereof;

(6) that no interest is payable on any refund;

(7) that the liability of a collector to be sued for such processing tax is abolished.

B. *The Decision of the District Court in the Present Case.*

The opinion of the District Court for the Northern District of Alabama, Southern Division, consisted merely of the assertion that all of the questions in the suit were decided by the case of *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386, 78 L. Ed. 859. The District Court indicated that it considered the burden of proving the new and additional facts required by Title VII of the Revenue Act of 1936, to be the same burden as that imposed by statute in the *Jefferson Electric* case.

In so holding the District Court failed to recognize the distinction between two very different situations. The statute considered in the *Jefferson Electric* case required the taxpayer to prove that he bore the burden of the tax, as a tax, and did not *by agreement with his vendee* collect the tax from the vendee, *as a separate identifiable sum*, treated by both vendor and vendee as a tax.

On this proof, the taxpayer was entitled to collect *all* of the money which he had paid to the collector and which he had not collected *as a tax* from his vendee.

By Title VII of the 1936 Revenue Act, the taxpayer is required to prove, *not* that he bore the burden of a tax, *as a tax*, but that he bore the economic burden which results from the imposition of any tax, without regard to whether or not he collected anything *as a tax* by agreement with his vendee, or merely sold his goods at a sales price which

may have been somewhat influenced by the additional cost of production resulting from the tax.

The basic distinction between these two burdens was recognized and clearly set forth by the Treasury Department in Regulations 47, issued in October, 1924, interpreting Section 600 of the Revenue Act of 1924, the statute involved in the Jefferson Electric Company case. This basic distinction was also pointed out by this Court in *Lash's Products Company* v. *United States*, 278 U. S. 175, 176.

However, these regulations and this controlling decision were completely overlooked by the District Court in the instant case.

The distinction between these two different types of statute is too important for this Court to ignore. The *Jefferson Electric* case held valid a statute which provided that only the taxpayer might recover a tax which had been improperly collected from him, and, that if he had assigned his right to the tax money by charging the tax to his vendee *as a separate item* under the permission of Regulations issued by the Commissioner of Internal Revenue, then not he, but his vendee-assignee—the actual taxpayer—might recover, unless he should give bond to pay the money over to his vendee-assignee. Title VII, on the other hand, prevents all refunds unless the taxpayer can show that he did not shift to his vendee the "economic burden" of the tax—a showing which the complexities of commerce and the limitations of cost accounting make impossible.

To permit the decision of the District Court in the instant case to stand unreversed is to sanction the extension of the Jefferson Electric doctrine to empower Congress to destroy all right to refunds, since, in an economic sense, all taxes are "shifted" or "passed on" by the taxpayer. It is respectfully suggested that such a result should not be reached, at least without the mature consideration of this Court.

C. *The Decision of the Circuit Court of Appeals in the Pending Case.*

Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the order of the District Court in the instant case granting the collector's motion to dismiss was affirmed, not because the Circuit Court was in agreement with the opinion of the District Judge that Title VII did not impose an unwarranted burden on the taxpayers, but because the Circuit Court believed that the District Court was without jurisdiction to decide the case at all.

The United States is not named as a party to the present suit. The complaint was brought against Harwell G. Davis, Collector of Internal Revenue. In spite of this, however, the opinion of the Circuit Court of Appeals consists of the assertion and argument of the following propositions:

(1) That an action against a Collector is in effect an action against the United States and that the Collector is merely a fictional defendant.

(2) That the United States may withdraw its consent to a suit against a Collector as an exercise of its sovereign immunity, thereby taking from the taxpayer all right of action to recover the taxes illegally exacted.

(1) No argument need be made at this point that the first proposition of the Circuit Court is incorrect. To say the least, it is startling. Certainly an action against a Collector and an action against the United States are legally distinct and separate, both in origin and effect, as has been successfully contended by Government counsel on behalf of a Collector of Internal Revenue in the case of *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1-4. *This has been consistently affirmed by this Court in a long line of decisions, and if the Circuit Court's opinion be correct, then this principle, expressed by this Court in the following cases, is overruled:*

Sage v. *United States*, 250 U. S. 33, 37.

Smietanka v. *Indiana Steel Co.*, 257 U. S. 1.
Union Trust Co. v. *Wardell*, 258 U. S. 357.
Levy v. *Wardell*, 258 U. S. 543.
Bankers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 398.

(2) The second proposition of the Circuit Court of Appeals, *i. e.*, that the United States may withdraw its consent to a suit against a Collector as an exercise of its sovereign immunity thereby taking from the taxpayer all right of action to recover the taxes illegally exacted, is clearly inconsistent with the expressed opinion of this Court. This proposition assumes that sovereign immunity may be extended not only to protect the United States, but also to protect an officer who commits a wrong against an individual, although the result be to deprive the individual of all remedy for the wrong whatever.

At the time the plaintiff taxpayer in the instant case paid the taxes in question under the Agricultural Adjustment Act, there accrued to that plaintiff taxpayer the right to have the tax money refunded if the tax was invalid. As was said by this court in the case of *United States* v. *Jefferson Electric Company*, 291 U. S. 386, 401:

> "If the tax was erroneous and illegal, as is alleged, it must be conceded that * * * there accrued to the taxpayer, when he paid the tax, a right to have it refunded, without any showing as to whether he bore the burden of the tax, or shifted it to the purchasers."

At the time the plaintiff taxpayer paid the tax there also accrued to him a right of action against the Collector of Internal Revenue who wrongfully exacted the tax money.

By enacting Title VII Congress seeks to destroy not only the taxpayer's right against the United States but also the taxpayer's right against the individual Collector who committed the wrong.

The plaintiff in the instant case asserted this destruction of its vested rights as a ground for invalidating Title VII. However, the Circuit Court of Appeals dismissed this argument as not relevant, indicating that in its opinion sovereign immunity might be extended to an officer acting under an unconstitutional statute even when the result was the entire destruction of the taxpayer's vested rights.

This proposition is clearly contrary to the statement of this Court in the case of *Graham & Foster* v. *Goodcell*, 282 U. S. 409. Here this Court stated:

> "The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. • • • If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 679, 680."

This language, which appears to state clearly what has been the consistent opinion of this Court, cannot be reconciled with the Circuit Court's decision in the instant case.

D. *Conclusion.*

The foregoing discussion has not been intended as an argument that the decisions of the District Court and the Circuit Court of Appeals in the instant case are necessarily in error, but rather to call attention to one fact; namely, *that these decisions, which involve Constitutional questions of the greatest importance, are apparently inconsistent with decisions of this Court which have long been assumed to represent established law. To permit the decisions of the*

District Court and of the Circuit Court of Appeals to stand, unconsidered by this Court, can, therefore, result only in confusion in a field of law where certainty is of the greatest importance.

For this reason, as well as for the other reasons heretofore stated, it is respectfully suggested that this Court should grant the Petition for Certiorari in the pending case.

Respectfully submitted,

GEORGE T. BUCKINGHAM,

As Amicus Curiae.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIÆ.

WILLIAM B. MCILVAINE,
WILLIAM B. HALE,
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Amici Curiæ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,

vs. *Petitioner,*

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

BRIEF AMICI CURIÆ

It is submitted that the judgment below should be reversed for the following reasons:

I. **The Court of Appeals erred in holding that Title VII of the Revenue Act of 1936 relied upon in defense to this case need not be tested under the Fifth Amendment to the Constitution.**

The opinion of the Court of Appeals is to the effect that:

1. This is not a suit at common law but against the United States, and

2. That the United States, being a sovereign, can decide when it may be sued, or withdraw the right of suit altogether and, hence

3. Since Title VII of the Revenue Law of 1936 attempts to deprive the court of jurisdiction of this kind of suit, it

is not necessary to consider whether that law is constitutional.

If this opinion is correct, then taxpayers whose taxes are paid are no longer protected by the Fifth Amendment to the Constitution; and as to all new taxes, the whole theory of corrective justice by way of collection and refund is destroyed. The taxpayers' only remedy will be by way of injunction.

It is here contended that the foregoing involves a total misapprehension of the purpose and the effect of the Fifth Amendment.

In the collection of taxes, it is the government which proceeds against the taxpayer; not the taxpayer against the government.

In the early days, before the system of refunds was established, the acts of Congress for excise and other taxes provided taxpayers a day in court as to the legality or erroneous assessment of taxes *before* the taxes were collected. This has been pointed out in the case of *Phillips* v. *Commissioner,* 283 U. S. 589, at page 595 (footnote). It is there also said, pages 595-597:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. *Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights,* summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare *Cheatham* v. *United States,* 92 U. S. 85, 88-89; *Springer* v. *United States,* 102 U. S. 586, 594; *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, *United States* v. *Woo Jan,* 245 U. S. 552; *Ng Fung Ho* v. *White,* 259 U. S. 276, the

statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue.

* * * * * * *

"Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate. Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Rowland*, 196 U. S. 631, 631. * * *" (Emphasis supplied.)

It will be noticed in the foregoing case that the Supreme Court had in mind *the total effect of the Fifth* Amendment which provides that no person shall be deprived of life, liberty *or property* without due process. It further recognizes that in cases of personal liberty the defendant is granted an earlier hearing than in the taking of property. *But the right to a hearing is guaranteed by the system of refunds in all tax cases.* Without this guaranty, where adequate opportunity is afforded for a later judicial determination of legal rights, those legal rights must be granted *before* the taxpayer is deprived of his property.

Also, in all of the following cases, the Supreme Court has recognized the right of the government to take property for taxation in advance of a determination of the validity of the taking; but, by providing for unqualified refunds, has established a *system of corrective justice* which adequately complies with the Fifth Amendment to the Constitution:

State Railroad Tax Cases, 92 U. S. 575, 613;
Snyder v. *Marks*, 109 U. S. 189;
Dodge v. *Osborne*, 240 U. S. 118;
United States v. *Jefferson Electric Co.*, 291 U. S. 386 395-396.

It must also be noticed that it has been specifically held by the Supreme Court that, with respect to the collection *and refund* of taxes, the law must comply with the Fifth Amendment to the Constitution, *and that the authority of Congress to withdraw the consent of the* **United States** to *be sued is no adequate argument.*

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, the court had under consideration the validity of Section 611 of the Revenue Act of 1928 which provided that taxes assessed or paid after the period of limitation should not be refunded to the taxpayer where the taxpayer had filed a claim in abatement or the collection of the tax had been stayed. The court tested this act under the due process clause and held it valid as a curative statute, but then said, pages 430-431:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen & Company, supra,* at p. 391. The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal and not against the United States. *Sage* v. *United States,* 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Company,* 257 U. S. 1, 4, 5. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, *it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.* See *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 679, 680." (Emphasis supplied.)

To the same effect was *United States* v. *Jefferson Electric Company,* 291 U. S. 386 at 403, citing the foregoing case.

This is a suit against the Collector: "The one who committed the wrong"; the one who, in the case of *Rickert Rice Mills Company* v. *Fontenot*, 297 U. S. 110, this court held to be a trespasser. In the foregoing case and in the following cases, the Supreme Court has recognized that suits against collectors are personal actions and not governed by the same rules as suits against the United States:

Sage v. *United States*, 250 U. S. 33, 37;
Smietanka v. *Indiana Steel Co.*, 257 U. S. 1;
Union Trust Co. v. *Wardell*, 258 U. S. 357;
Levy v. *Wardell*, 258 U. S. 543, and
Bankers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 398.

It should also be noticed that Title VII of the Act of 1936 on which the Government relies is not merely an attempt to withdraw the right of the United States to be sued. The sections relating to that subject are inseparably connected with the other parts of the statute; so that the total effect of the act is to deny the fundamental right of the taxpayer to a refund of all taxes paid in *any* suit.

If the government as a sovereign has the power to deny the taxpayer any day in any court, either against a collector or the United States, then the only way in which the validity and application of taxing laws can be tested by the taxpayer is by way of injunction which, under the statutes, is denied to him. Of course, if all other remedies are closed, the courts would be obliged to grant injunctions in all cases of illegal taxes. But this would throw the burden upon the courts of examining into income tax returns to find out whether they have been properly computed, as well as to examine into all other taxes, including the question of the constitutionality of the levies.

Also, if the Court of Appeals is correct, and the princi-

ple of sovereign immunity is applicable in this case, Congress could abolish the writ of *habeas corpus* (so far at least as it is protected under the Fifth Amendment.)

The truth is that the right to sue the collector for recovery of a tax that had been paid is not in reality a grant of the sovereign to the individual. It is a practical substitution for the right to defend before payment, by injunctive process or otherwise. And since the government can deny the right of injunction against the collection of the tax (thereby forcing its payment) only by giving a remedy to collect back, it may not grant such remedy until the tax is paid and afterward wipe it out.

We therefore submit that Title VII of the Revenue Act of 1936 which attempts to take away the jurisdiction of the court in this case, and denies the right to sue for all taxes paid in any case, must be tested under the Fifth Amendment to the Constitution.

II. Title VII of the 1936 Revenue Act Denies to the Taxpayer due process of law, and is therefore unconstitutional.

Statutes relating to refunds are unconstitutional where they do not furnish adequate opportunity for a judicial determination of legal rights, and all statutes relating to taxation are unconstitutional which are arbitrary, unreasonable, oppressive or unjust. *Phillips* v. *Commissioner*, 283 U. S. 589; *Davidson* v. *New Orleans*, 96 U. S. 97; *Retirement Board* v. *Alton Railroad Company*, 295 U. S. 330; *Hoeper* v. *Tax Commission*, 284 U. S. 206.

Title VII of the Revenue Law of 1936 is unconstitutional on all the foregoing grounds.

It will not be denied that, when the taxes were paid which are in question in this case, and when the claim for refund

was filed and when this suit was brought, the taxpayer had a right to a refund of all the taxes which it had paid.

After the suit was brought, Congress passed the Revenue Act of 1936. Title VII of this Act is relied upon as the only defense to this case.

Title VII does not purport to deny all refunds to taxpayers.

Title VII provides that no refund of Agricultural Adjustment Act taxes shall be made or allowed unless the claimant establishes that he bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor, nor shifted such burden directly or indirectly.

This is the principal provision of Title VII upon which everything else is founded. No refunds are allowed at all unless the taxpayer can prove that he did not shift the burden of the tax. And the burden of making the proof is on the taxpayer.

Section 907 of the Act then provides for evidence and presumptions with respect to proof of the ultimate question of whether or not the taxapayer bore the burden of the processing tax or shifted it to others. Section 907 provides: (1) That it will be *prima facie* evidence that the taxpayer bore the burden to the extent that the average margin per unit of commodity processed was lower during the tax period than the average margin was during the period before and after the tax.

The average margin is then defined to be the difference between (1) the average gross sales value of the articles processed less (2) the average cost of the commodity and the processing tax paid. These margins are obtained (1) for a period of twenty-four months prior to the tax, and (2) for a period of six months after the tax, and (3) for the tax period. The margin in the two periods before and

after the tax are averaged and compared with the margin for the tax period.

Thus Section 907 allows a presumption in favor of the taxpayer to the extent that the difference between average cost and average selling price for certain periods before and after the tax is greater than the average difference during the period of the tax.

But this presumption may be rebutted by the commissioner or the taxpayer by almost any kind of proof. The Act provides for certain proof that will be especially allowed. The first proof specified is:

Proof that the difference or lack of difference between the average margin for the tax period, and the average margin for the period before and after the tax was due to changes in factors other than the tax.

The foregoing are the essential features of the limitations placed upon the refund to taxpayers. These limitations contemplate that the taxpayer cannot get back any of the tax paid unless and only to the extent that he himself can prove that he bore the burden of the tax.

And the statute itself makes it apparent that this proof cannot be made.

We do not refer to the complicated accounting that would be involved. That indeed is a heavy burden on the taxpayer and for most taxpayers would be technically impossible except by the use of approximations. But this is not the point here made. A *fundamental impossibility* exists in two respects:

1. The presumption allowed in Section 907 has no rational connection with the ultimate fact presumed, and

2. There is no way by which anyone can determine the ultimate fact.

1. *The presumption is unconstitutional:*

This Court has held, with reference to presumptions provided in statutes, that it is essential for the legality that there be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from the proof of another shall not be so unreasonable as to be a purely arbitrary mandate. (*McFarlane* v. *American Sugar Co.*, 241 U. S. 79, page 86; *Bailey* v. *Alabama*, 219 U. S. 219; *Manley* v. *Georgia*, 279 U. S. 1; *Western and Atlanta R. R. Co.* v. *Henderson*, 279 U. S. 639).

Section 907 of Title VII does not comply with this requirement. The ultimate fact here to be proved is as to whether or not the taxpayer obtained the payment of his tax from someone else. The whole statute presumes that he did obtain the payment of the tax from someone else; but he is allowed to prove that he did not; and it is *prima facie* proof that he did not if he shows an unfavorable margin between cost and selling price during the tax period.

A difference between the cost of an article and its selling price or its sales value cannot and does not indicate whether or not the processing tax was collected from someone else.

This is true for two reasons:

(a) Prices of cotton and of textiles are made in the open market in competition. The tax was a manufacturer's tax fixed on the processing of the article. It was in all respects like the tax before this court in *Liggett & Myers Tobacco Co.* v. *United States* (57 Sup. Ct. Rep. 239), where this Court held that a stamp tax on tobacco paid by the manufacturer was not a sales tax and was not a burden upon the purchaser. In that case the government's brief said:

> "The tax was a prior ordinary burden of taxation, and, like an income tax or a property tax, represented a part of the manufacturing cost, • • •. The vendee

> neither directly nor indirectly paid the tax, as a tax, but paid a fixed price which might or might not have included the full manufacturing cost of the article including the manufacturing tax thereon."

In *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, it was stated that, under the facts in that case, the tax on transportation was upon the seller. The court said, page 579:

> "the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. *United States* v. *Normile,* 239 U. S. 344, 348. It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale."

In *Cornell* v. *Coyne,* 192 U. S. 418, it was held that a general tax on filled cheese which was made for export was only a tax or duty on the manufacturing of articles in order to prepare them for export. And, if a farmer raises cattle with the purpose of exportation, and in fact exports them:

> "Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the Constitutional provision [prohibiting taxes on exports] is that *no burden* by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated."

In *Lash's Products Company* v. *United States,* 278 U. S. 175, 176, it was said of a manufacturer's tax on soft drinks:

> "The phrase 'passed the tax on' is inaccurate as obviously the tax is laid and remains on the manufacturer and on him alone. *Heckman & Co.* v. *I. S. Dawes & Son Co.,* 12 Fed. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for

the goods because of the seller's obligation, but that is all."

Thus it has been established that the tax and the burden of the tax are both on the taxpayer. Except in cases of special contract, all goods are sold and services rendered for value received, and the person who pays real estate or income or manufacturing taxes necessarily bears the burden. And no one can determine from the difference in the margin whether or not the tax is included any more than this can be determined with respect to other taxes, wages or overhead costs.

(b) The presumption also leaves out the element of costs.

If a manufacturer makes a profit in any year, then in a general sense the burden of all his costs and all his taxes has been passed on to his purchasers.

If he makes a loss, perhaps he has borne the burden.

At all events, the burden might be shifted to laborers or absorbed in the price of labor or other costs. This is especially important because of the higher labor costs required under the National Recovery Act which was then in force.

Of course, if costs are considered, the lack of uniformity in the application of any general theory becomes more apparent.

For, taking all elements into consideration, nothing can really be ascertained; yet the mere omission of costs from consideration in the presumption is fatal to the validity of the presumption.

2. *There is no way by which anyone can determine the ultimate fact.*

Section 907 sets up a supposed standard of comparison in order to determine a margin. It assumes that a comparison of margins obtained during the tax period with the period before and after the tax will determine the ultimate fact. But the first sentence allowing additional proof demonstrates the contrary. This sentence (above quoted)

allows either the commissioner or the taxpayer to prove that the difference between these average margins "was due to changes in factors other than the tax".

Thus it is apparent that in order to prove the shifting of the burden of the tax by a comparison of prices and costs there must be eliminated from the costs and values which are used, *all factors which do not relate to the tax.*

The Court will take judicial notice that the period of twenty-four months prior to May 12, 1933, when the A. A. A. became a law, was a period of great depression. Prices of all products were going down during that time. Beginning early in 1933 prices began to rise, principally because the N. R. A. was anticipated and was enacted June 16, 1933, and possibly because Congress passed the act relating to the devaluation of the dollar; possibly because the election of Mr. Roosevelt had brought about a general feeling of optimism; possibly because this was due in part to the A. A. A., which was enacted for the purpose of passing large sums of money to the farmers who in turn would become purchasers, and who, because they anticipated such funds, were willing to pay higher prices, both before and after the law was enacted.

The point is that, in order to prove from a comparison of values in goods (which really means prices), that a processor "passed on" a particular tax, it would be necessary to determine what part of an increased price was due to all of the foregoing elements and to eliminate such increase so that then the increase in price might possibly be regarded as due solely to the taxes paid by the processor. Of course even this would not be proof; but this is what the act intends.

No accountant, no economist and no court can make such a computation. The same kind of problem was before this court in *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, where Mr. Justice Holmes held that what the "real

value" of articles would be in a market not affected by combinations in restraint of trade, with exclusion of other abnormal influences and perhaps with exclusion of increased efficiency in machines; but with inclusion of the effect of the combination so far as it was economically beneficial, was a problem that "no human ingenuity could solve".

3. *The whole effect of Article VII of the Revenue Act of 1936 renders it unconstitutional.*

In the case of *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, the statute (relating to a sales tax) provided for the refund of *all* taxes erroneously paid. The taxpayer could get all he paid even if he had passed on the tax by adding it to the price of the goods, merely by furnishing a bond that he would account to his purchaser. And thus the refund would reach those who by special contract or understanding were entitled to it. Many taxpayers have no doubt specifically added A. A. A. taxes on to the price of goods, and thus have become indebted to purchasers. A refund to the taxpayers will enable them to discharge this debt, and may also benefit other purchasers in the future by a reduction of prices—although this cannot be perceived any more than a margin between cost and price can determine whether the burden was shifted.

Title VII makes no such provision. It grants nothing either directly or indirectly to non-taxpayers. The Senate Committee believed that most of the A. A. A. taxes were *"passed on"*. (*Senate Report 2156.*) If this is true, then the statute is an attempt retroactively to validate most of the A. A. A. exactions. Its effect is to amend the Agricultural Adjustment Act by fixing the so-called tax on those who were not then taxed and then denying all refund.

This violates the Constitution as did the laws considered in *Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermeyer* v. *Anderson*, 276 U. S. 440, and *Coolidge* v. *Long*, 282 U. S. 582.

A ratification cannot be made even if the A. A. A. provided for a tax; for nothing can be ratified which the Congress had no power to authorize in the first place. (*Stockdale* v. *Insurance Companies*, 87 U. S. 323; *United States* v. *Heinszen & Co.*, 206 U. S. 370.) Moreover this Court held in *United States v. Butler*, 297 U. S. 1, that these were not taxes. They were illegal exactions. These exactions could not be made even under the decision in *Head Money Cases*, 112 U. S. 580, because the court held that the end to be attained was not one falling within the power of Congress.

For the foregoing reasons, we contend that the taxpayer is entitled to a full refund of all moneys paid.

Respectfully submitted,

WILLIAM B. MCILVAINE,
WILLIAM B. HALE,
As Amici Curiae.

(8737-C.)

FILE COPY

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936

No. 667.

ANNISTON MANUFACTURING COMPANY,
a Corporation,

Petitioner,

vs.

HARWELL G. DAVIS, Collector of Internal Revenue,

Respondent.

BRIEF OF AMICUS CURIAE.

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Attorneys for Charles W. Priddy & Company.

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Respondent.

BRIEF OF AMICUS CURIAE.

I.

Statement of interest.

Charles W. Priddy & Company, a Virginia corporation, through its attorneys, Toy D. Savage, of Norfolk, Va. and William R. Perkins, of 30 Rockefeller Plaza, New York City, files this brief *amicus curiae* in support of the contentions of the Petitioner in the above entitled case. It is vitally interested in the questions thereby presented because they are involved in an identical action (now on appeal in the Circuit Court of Appeals for the Fourth Judicial Circuit) which was instituted by it on November 22, 1935, in the District Court of the United States for the Eastern District of Virginia, against N. B. Early, Jr., Collector of Internal Revenue for the District of Virginia, to recover $77,773.41 paid on the manufacture of bags from jute fabric during the period Janu-

ary 1934 to April 1935 as processing taxes under the Agricultural Adjustment Act.

Claim for refund had been filed July 13, 1935, in accordance with the applicable Sections 3220, 3224, 3226 and 3228, as amended, of the Revised Statutes (26 USCA 1670, 1543, 1672-3 and 1433) and rejected by the Commissioner on the ground that said Act was constitutional. Demurrers were interposed by the Collector which asserted first Sec. 21(d) added to said Act by the Amendments approved August 24, 1935 (Public No. 320, 74th Congress) and then Secs. 901-913, Title VII of the Revenue Act of 1936, approved June 22, 1936, which latter are the very statutes involved in the very same way in the above entitled case.

The District Court (Judge Way) overruled the demurrers and rendered judgment for the full amount claimed, with interest, because it was of opinion, as stated in its order, that:

> "* * * as applied to the facts and circumstances so appearing from the allegations of the declaration of plaintiff herein, Section 21(d)(1) of the 1935 amendment to the Agricultural Adjustment Act, set up by the original demurrer of the defendant filed herein on February 26, 1936, and Title VII of the Revenue Act of 1936, set up by the second demurrer of the defendant filed herein on September 22, 1936, are unconstitutional and void as to the rights of the plaintiff in this case, for the reason that said Section 21(d)(1) of the 1935 amendment to the Agricultural Adjustment Act and Title VII of the Revenue Act of 1936 are not merely procedural but, if held to be valid and given effect, would destroy the vested substantive rights of plaintiff, * * *."

II.

Essential facts.

The payments sought to be recovered were, and are, unconstitutional collections by the Federal Government to which it has not, and cannot by ratification have, any right or title of any kind whatever. This is settled beyond all controversy by the decisions of this Court in the *Butler* and *Rice Millers* cases (297 U. S. 1, 110).

These payments were made on the faith of the familiar statutory provisions as to refund then applicable—namely, Secs. 3220, 3224, 3226 and 3228, as amended, of the Revised Statutes (26 USCA 1670, 1543, 1672-3 and 1433). They had been a part of the Federal Revenue System for years and neither by their terms nor in their administration was there ever the slightest suggestion that a passing on of the tax would in any way affect the refund. On the contrary, if the taxpayer showed the collection wrongful in fact or law he obtained full refund, with interest, without more, unless he had slept on his rights. Thus did the refund provisions of the statutes conform to the constitutional provisions with respect to the taking of property by taxation.

Only after these payments had been thus made, and the constitutionality of the Agricultural Adjustment Act came seriously to be questioned, was provision made whereby, if valid, the Federal Government might retain these payments, though unconstitutionally collected, to the extent that the processor, who alone might file claim for refund, had passed on the tax.

Such provisions were first enacted in Sec. 21(d), added to the Agricultural Adjustment Act by the Amendments of August 24, 1935. It provided, among

other things, by subdivision (1) that no recovery could be had in any manner of any amount theretofore or thereafter paid under the Agricultural Adjustment Act unless the claimant established to the satisfaction of the Commissioner that neither the claimant, nor anyone for him, had "included such amount in the price of the article" or had "passed on any part of such amount to the vendee or to any other person in any manner".

For Sec. 21(d), which was quite generally deemed unconstitutional (see Note), the Revenue Act of 1936 has now substituted Title VII, Secs. 901-913 (7 USCA 644-655), and it is their meaning and validity which constitute the questions at issue.

While these new sections differ in their phraseology from Sec. 21(d), disregarding their procedural provisions (such as requiring a new claim for refund, imposing new statutes of limitation, erecting a new board of review, and prescribing complex and arbitrary rules for ascertaining the "passing on"), it will be found that their substantive provisions constitute an integral scheme of legislation to accomplish the very same end which Sec. 21(d) sought to accomplish. These substantive provisions are:

(1) Sec. 910, which, if valid, would forbid any proceeding against a Collector and thereby restrict the taxpayer to the limited relief offered by the other sections of this legislation, by providing that no Collector

"shall be in any way liable to any person for any

NOTE: *G. B. R. Smith Milling Co.* v. *Thomas* (D. C. N. D. Tex.), 11 F. S. 833; *John A. Gebelein* v. *Milbourn* (D. C. Md.), 12 F. S. 105; *Baltic Mills Co.* v. *Batgood* (D. C. Conn.), 12 F. S. 132; *Kingan & Co.* v. *Smith* (D. C. S. D. Ind.), 12 F. S. 329; *Larabee Flour Mills* v. *Nee* (D. C. Mo.), 12 F. S. 395; *A. P. W. Paper Co.* v. *Riley* (D. C. N. D. N. Y.), 12 F. S. 738; and *Shenandoah Milling Co.* v. *Early* (D. C. Va.), 3 U. S. L. W. Index 119.

> act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act or for the recovery of any money exacted by or paid to him and paid into the Treasury in performance of his official duties under the provisions of such Act."

(2) Sec. 902, which definitely limits the recovery of the taxpayer, through the remedy to which he is thus restricted, by its provisions that:

> "No refund shall be made or allowed in pursuance of court decisions or otherwise of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act,"

unless the claimant satisfactorily establishes, in the manner and before the tribunal designated by these sections,

> "(a) That he bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor, nor shifted such burden, directly or indirectly, * * *, or
>
> "(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

Of course this means that to the extent the claimant may not be able to bear the burden of proof thus thrown upon him with respect not only to himself, but as to his vendee and the latter's business and affairs, the Federal Government will retain the payments, though unconstitutionally collected, just as would have been the case under Sec. 21(d). And what this burden

of proof means in this respect is shown, not only by the complexity and arbitrariness of the provisions of the lengthy Sec. 907 (which we forbear to detail), but also by the very nature of the tax. It is not a tax on sales, added by the manufacturer to his bill of sale, as in *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386. On the contrary, it is a tax on the act of processing, which is required to be paid by the processor (Sec. 9(a) of AAA), whether or not the product is ever sold, and as such enters into the cost and has no relevancy to the sale price. It falls strictly within the category described by this Court in *Lash's Products Co.* v. *United States*, 278 U. S. at 176, when it said:

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer, and on him alone. * * * The purchaser does not pay the tax. He pays, or may pay, the seller more for the goods because of the seller's obligation, but that is all. * * * The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price * * *."

This is settled, and therefore such taxes are not upon exports (*Cornell* v. *Coyne*, 192 U. S. 418) and may be imposed on products sold States (*Liggett & Myers Tobacco Co.* v. *United States*, 81 L. ed. 215). In *Liggett & Myers Tobacco Co.* v. *United States*, (C. C. A. 3rd) 77 F. (2d) 65, 67, the Court declared the similar tax on the manufacture of tobacco products to be "a plain occupational tax imposed upon the manufacturer without reference to the sale or place of sale of the manufactured products".

Ascertainment of the passing on of such a tax has been the despair of both courts and economists (see

Indian Motor Cycle Co. v. *United States*, 283 U. S. at 581-2, and Notes 1 and 2 to said opinion). District Judges of long experience expressed their considered opinions that such conditions imposed by Sec. 21(d) were practically impossible to perform. See: *G. B. R. Smith Milling Co.* v. *Thomas*, (D. C. N. D. Tex.) 11 F. S. at 835; *John A. Gebelein* v. *Milbourn*, (D. C. Md.) 12 F. S. at 123-4; *Baltic Mills Co.* v. *Bitgood*, (D. C. Conn.) 12 F. S. at 134; *Kingan & Co.* v. *Smith*, (D. C. S. D. Ind.) 12 F. S. at 335; *A. P. W. Paper Co.* v. *Riley*, (D. C. N. D. N. Y.) 12 F. S. at 742-3; and *Shenandoah Milling Co.* v. *Early*, (D. C. Va.) 3 U. S. L. W. Index 119.

III.

Said Sections 902-913 are wholly unconstitutional because they constitute an integral plan which allows, and was intended to allow, the Federal Government to retain exactions unconstitutionally collected under AAA in the name of taxation.

Passing by two of the vital constitutional questions presented, namely:

(1) The attempt of these sections retroactively to abolish the taxpayer's cause of action against the Collector—a purely personal action between private citizens which dates from the common law and to which the United States is a stranger (*Sage* v. *United States*, 250 U. S. 33, 37; *Graham* v. *Goodcell*, 282 U. S. 409, 430-1);

(2) The attempt of these sections retroactively to impose an arbitrary and discriminatory burden of proof, which is perhaps impossible of performance, as a condition of obtaining refund (*Nichols* v. *Coolidge*, 274 U. S. at 542; *Coolidge*

v. *Long*, 282 U. S. at 596; *Heiner* v. *Donnan*, 285 U. S. at 326);

we confine this brief to this single constitutional question, also presented and which we consider fundamental:

> Can the Federal Government thus impose an integral scheme of legislation with respect to the refund of previous unconstitutional collections in the name of taxation, with the intent and effect that thereby it may retain the whole or a part of such unconstitutional collections?

In order to discuss this question in its true light we should remark preliminarily that, while the legislation involved is sought to be sustained on the theory that thereby the Government is preventing processors from unjustly enriching themselves, its real object is not restoration of the tax payments to those who bore their burden but retention by the Government of amounts it could not constitutionally collect—a course of conduct which this Court has declared not only "unjustly enriched" the Government (*Moore Ice Cream Co.* v. *Rose*, 289 U. S. at 378-9) but "immoral" and "a fraud on the taxpayer's rights" (*Bull* v. *United States*, 295 U. S. at 261). Such a course of conduct on the part of the Government is therefore the real issue here; and it is neither related to, nor condoned by, the effort of the processor to recoup this added item of cost in the difficult depression days.

As District Judge Paul most pertinently remarked of Sec. 21(d) in the *Shenandoah Milling Co. Case*, *supra*:

> "The court is not impressed by the argument that the government should not be compelled to pay the taxpayer anything except what he him-

> self can show he has paid. That position is that the government wants to keep money it has illegally collected from someone else because that other person cannot show where he got it. The equities of the government are not above the equities of the citizen."

Similarly, District Judge Otis said in the *Larabee Mills Co. Case, supra:*

> "* * * * In the multitude of cases in which equity has enjoined the collection of illegal taxes none can be found in which the taxpayer has been required to show affirmatively that if he pays the tax, he will not include it or some part of it in the prices of commodities or services which he sells. * * * The funds from which he will pay the tax are his funds and not the less so because they may be replenished by the sale of his products to others. He has been damaged when his money has unlawfully been taken from him and not the less so because he may make himself whole through the consummation of some contract not with the wrongdoer, but with some third person."

The question, therefore, is not one of the *right* of the Government to retain these payments—it has no such *right* because the payments were collected unconstitutionally. That is settled. It is purely a question of whether or not the Federal Government has the *power* so to restrict by this retroactive legislation the unrestricted terms of the statutes for refund (which the Agricultural Adjustment Act adopted for the purposes of that Act, upon the faith of which the advance payments were made and in virtue of which the Government sought to prevent injunctive relief against other such payments, even after Sec. 21(d) was mooted) in order that it may now retain the whole or a part of such payments, though they be unconstitutionally collected.

If the Federal Government were suing to collect the amounts it seeks thus to retain, it would be totally unable to recover (regardless of whether the processor had or had not passed on the amount claimed) because the Federal Government has no constitutional right to collect. In the *Rice Millers Case* (297 U. S. 110) this Court unanimously declared that if a Collector should then attempt to collect amounts as processing taxes under the Agricultural Adjustment Act "he would be a trespasser"; and this would be true whether or not the processor had passed on the tax.

If the provisions of Secs. 902-913 had been in force when the payments in question were made, collection of such payments could have been enjoined on the ground that such sections afforded a remedy, by way of claim for refund, too uncertain and inadequate to comply with the requirements of the Fifth Amendment (*Union P. R. Co.* v. *Weld*, 247 U. S. at 285-6; *Wallace* v. *Hines*, 253 U. S. at 67-8; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. at 679-82; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. at 509-11; *Graves* v. *Texas Co.*, 298 U. S. at 401-4).

It follows, necessarily, that the factual possession of such collections by the Federal Government by reason of their advance payment under such circumstances gives rise to no such power. Otherwise an easy way will have been found of circumventing most vital provisions of the Constitution for safeguarding the rights of the citizen from both Federal and State action in respect to taxation, since the applicable clause has the same meaning in both the Fifth and Fourteenth Amendments (*Heiner* v. *Donnan*, 285 U. S. at 326). And not only that, but by the same process there may be a like circumvention of the provisions of the Constitution with respect to eminent

domain; for here also acquisition by the Government first occurs, and thereafter come ascertainment and relief for the property owner (*Phillips* v. *Commissioner*, 283 U. S. at 597).

The Federal Government may not thus play fast and loose with the provisions of the Constitution as respects either taxation or eminent domain (*Davidson* v. *Board of Administrators*, 96 U. S. at 102; *Monongahela Nav. Co.* v. *United States*, 148 U. S. at 336-7). The system of Federal tax collection, by which the citizen first pays and then his rights are ascertained and relief awarded under claim for refund, has been sustained solely on "the underlying principle" that by such payment the rights of the taxpayer were not changed, but there occurred only a postponement of the ascertainment and relief in that respect because of the convenience of the Government with regard to its revenues (*Phillips* v. *Commissioner*, 283 U. S. at 595-7). Among the questions thus postponed was that of the constitutionality of the exaction, which the Courts held did not entitle the taxpayer to an injunction restraining payment because the provisions for refund afforded him just as full a measure of relief (*Bailey* v. *George*, 259 U. S. 16; *Graham* v. *Du Pont*, 262 U. S. 234). Manifestly, therefore, the legislation here involved, to the extent the Federal Government may thereby retain unconstitutional collections, flies squarely in the face of this underlying principle and the provisions of the Constitution which necessitated it. This is established and illustrated by the whole course of judicial authority on this subject.

On this account under this system of federal tax collection the Government is regarded throughout as being in the attitude of thereby collecting from its citizen. This was fully explained and authoritatively

held in *Bull* v. *United States*, 295 U. S. 247, 259-60, where this Court said:

> "Thus the usual procedure for recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. * * * But these reversals of the normal process of collecting a claim cannot obscure the fact that, after all, what is being accomplished is a recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken, in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer."

On this account, also, such payments create even more than an obligation on the Federal Government to refund the unconstitutional collections. The Government holds such collections as a trustee for the benefit of the taxpayer, bound in that respect as would be an individual, with its sovereignty in no wise involved. The retention of such collections by the Federal Government is "immoral and amounts in law to a fraud on the taxpayer's rights". This was the unanimous conclusion of this Court in *Bull* v. *United States*, 295 U. S. at 261, where it said of such retentions:

> "* * * Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of their agent. *United States* v. *State Nat. Bank*, 96 U. S. 30, 24 L. ed. 647. *While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights.* What was said in the *State*

> *Nat. Bank* case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial * * * In these cases, [cited in the opinion] and many others that might be cited, the rules of law applicable to individuals were applied to the United States' (pp. 35, 36). A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. *United States* v. *Macdaniel*, 7 Pet. 1, 16, 17, 8 L. ed. 587, 592, 593; *United States* v. *Ringgold*, 8 Pet. 150, 163, 164, 8 L. ed. 899, 903, 904." (Italics ours.)

In *United States* v. *State Natl. Bank*, 96 U. S. 30, 36, whose ruling this Court in the *Bull* case thus adopted and applied, the doctrine had been broadly stated, on a review of the authorities, that:

> "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. *Their sovereignty is in no wise involved.*" (Italics ours.)

These essential facts and principles control, and totally distinguish this case from those urged by the Government in support of this legislation.

These facts and principles prevent the Government from retaining such unconstitutional collections under the cases with respect to the immunity of a sovereign

from suit. The *Bull* case has established, as we have just seen, that the immunity of the sovereign has no relationship to, and cannot be asserted to authorize, such retentions of unconstitutional collections, because such retentions are in fraud of the taxpayer's rights and thus constitute a trust fund for his benefit, in respect of which the Federal Government is liable in its corporate character, just as would be an individual, with its sovereignty in no wise involved. See, to the same effect, *United States* v. *Lee*, 106 U. S. at 218-21, where Mr. Justice Miller, speaking for this Court, in most forceful and eloquent language upheld the power and the duty of the Federal Judiciary to enforce the provisions of the Fifth Amendment for the rescue of property unconstitutionally taken by the Federal Government, just as in *Ex parte Milligan*, 4 Wall. at 118-24, it had upheld and enforced such provisions for the protection of life and liberty.

In addition, sovereign immunity is not an authority for the legislation here involved, because it does not simply withdraw the consent of the United States to be sued; it goes further and nullifies the right of refund afforded the taxpayer when he made the payments, a right which belongs to him in virtue of the Constitution. Said sections strictly confine the right of refund for exactions under the Agricultural Adjustment Act to the narrow compass they specify, and beyond that compass by virtue of this legislation the right to refund of these payments has been abolished, if this legislation be valid. In *Lynch* v. *United States*, 292 U. S. 571, after an exhaustive review of the authorities on this subject, it was held that sovereign immunity could not save a statute which likewise would have prevented recovery on war veterans' insurance policies, because that Act did not simply withdraw the consent of the Government to be sued, but abrogated the contractual right expressed in the policies and thereby offended the Fifth Amendment.

Squarely in point is *Graham* v. *Goodcell*, 282 U. S. 409, 430-1, where this Court unanimously declared of the very same argument on the part of the Government:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen*, 206 U. S. 391, 51 L. ed. 1106, 27 S. Ct. 742, 11 Ann. Cas. 688, *supra*. The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. *Sage* v. *United States*, 250 U. S. 33, 37, 63 L. ed. 828, 830, 39 S. Ct. 415; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4, 5, 66 L. ed. 99, 100, 101, 42 S. Ct. 1. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 679, 680, 74 L. ed. 1107, 1112, 1113, 50 S. Ct. 451."

In *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338, this Court reached a similar conclusion with respect to a kindred attempt on the part of a State. It held that Florida could not by retroactive legislation retain tolls unlawfully collected, saying:

> "But courts cannot go very far against the literal meaning and plain intent of a constitutional

> text. Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right."

These essential facts and principles likewise totally distinguish this case from another case urged in support of this legislation—*Cary* v. *Curtis*, 3 How. 236. While in that case the Act had a prospective operation only, so that it amply warned taxpayers, and dealt with foreign commerce, as to which the power of Congress is extremely broad (*Buttfield* v. *Stranahan*, 192 U. S. 470), even permitting the imposition of charges that are not true taxation (*Head Money* cases, 112 U. S. 580), nevertheless the majority opinion indignantly denied that the Act involved in any way sought to preclude the taxpayer from securing a full recovery. Pointing out that the Act simply transferred the proceeding from the Collector who had paid in the money to the Government which had received and held the money, and in so doing left many ways (which the Court specified) by which the taxpayer could obtain full refund, the Court declared (3 How. at p. 250):

> " * * * The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from, and indeed are the only foundation of a right of recovery in this particular form of action. And here is presented the answer to the assertion that by the Act of 1839, or by the con-

> struction given to it by this court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither have Congress nor this court furnished the slightest ground for the above assertion."

In this category fall those decisions which uphold the right of the Federal Government to impose conditions, such as the form of the claim for refund, its review by the Commissioner or Board, and a statute of limitations on the presentation and review of the claim, and a suit in that respect (examples of which are *Cheatham* v. *United States*, 92 U. S. 85; *Arnson* v. *Murphy*, 109 U. S. 238; and *Schoenfeld* v. *Hendricks*, 152 U. S. 691) or which enlarged the taxpayer's right of recovery (as in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373). In none of them did the Government seek, as here, to minimize the taxpayer's right of recovery. On the contrary, each Act involved left ample remedy for full recovery and the Court often made this plain. Thus, in the *Moore Ice Cream Co. Case*, which upheld a statute dispensing with protests, the Court used this language, which is quite pertinent in the instant case:

> "In this situation the Government was *unjustly enriched* at the expense of the taxpayer when it held on to moneys that had been illegally collected, whether with protest or without. * * * A high minded government renounced an advantage that was felt to be ignoble and set up a new standard of equity and conscience." (pp. 378-9; our italics)

These essential facts and principles also totally distinguish the case upon which, perhaps, most reliance is placed to support the legislation involved here—*United States* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386. Aside from the fact that in the *Jefferson Case*

the manufacturer was acting but as the agent of the Government for the collection of a sales tax, the Act involved in that case not only contemplated and provided for refund to the taxpayer of that portion of the payments which on the ascertainment under the Act it was found he had absorbed or refunded, but also for that portion which upon such ascertainment it was found he had passed on and not refunded, upon the simple condition that he give bond to refund such portion to those who had really borne it. Thus the Act contemplated and provided for a complete refund, without the Federal Government retaining any part whatever of the wrongful collections; and it was this which caused the Court to uphold the statute, for it said that under these circumstances it did not do

> "more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest. We do not perceive in the restriction any infringement of due process of law." (pp. 401-2)

In the instant case, quite to the contrary, the said Secs. 902-913 make no provision for a refund of that portion of the unconstitutional exactions which upon the ascertainment under the complex and arbitrary terms they impose the taxpayer may find himself unable to prove he has either absorbed or refunded to a vendee who himself absorbed, without any shifting or reimbursement. They thus contemplate and provide for retention of unconstitutional collections by the Government,—indeed, we know this legislation was framed with the intent and expectation that thereby large portions of these unconstitutional collections

might through its terms be thus retained. In this vital, paramount respect, therefore, the Act involved in the instant case, in both its intent and its effect, differs from the Act involved in the *Jefferson Case* as the night differs from the day, and it is impossible for the Act involved in the instant case to find support in the *Jefferson Case*, unless a case which sustains an Act that contemplates and provides for full refund of wrongful collections is a precedent for an Act which contemplates and provides for the retention by the Federal Government of unconstitutional collections.

Conclusion.

Accordingly, we respectfully submit that, for the reasons and upon the authorities above given, Secs. 902-913 of Title VII of the Revenue Act of 1936 constitute an integral piece of unconstitutional legislation, framed as a scheme by which the Government may retain unconstitutional collections, in the name of taxation, under the Agricultural Adjustment Act, and wholly void on that account (*Carter* v. *Carter Coal Co.*, 298 U. S. at 312-13; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. at 361-2; and cases cited by them).

March 15, 1937.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1936.

No. 667.

Anniston Manufacturing Company,

Petitioner,

v.

Harwell G. Davis, Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT THEREOF.

EDWARD R. HALE,
BENNETT SANDERSON,
Amici Curiae.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1936.

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ANNISTON MANUFACTURING COMPANY, *Petitioner*,

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HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned respectfully move this Honorable Court for leave to file a brief as amici curiae in the above-entitled suit. The Solicitor General and Counsel for the petitioner have assented in writing as indicated by letters filed with the Clerk of Court.

Respectfully submitted,

EDWARD R. HALE,
BENNETT SANDERSON.

Supreme Court of the United States.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief is filed by Edward R. Hale and Bennett Sanderson as *amici curiae* on behalf of the Receivers of Hoosac Mills Corporation and Quissett Mill, both of whom have similar claims pending before the Circuit Court of Appeals for the First Circuit.

The statute involved is Title VII of the Revenue Act of 1936. That is the part of the Act which imposes restrictions upon obtaining refunds of certain taxes illegally collected. The taxes involved are floor stocks and processing taxes collected by the defendant collectors of internal revenue under the invalid Agricultural Adjustment Act.

The gist of the complaint is this: The money taken under the invalid law belongs to the plaintiff mills without any ifs, ands or buts. The statute prevents the mills from getting their money unless they can prove facts which have nothing to do with their right to get back their property. That without more is a wrong, morally, and under the Fifth Amendment. But the statute goes further. As part of the plan to enable the government to retain property illegally taken, it attempts to prevent any recovery whatsoever from the collectors who were liable for these unlawful collections when they collected them. That is a taking of the vested property right of the mills in their causes of action.

We have stated that the new facts the mills are required to prove have nothing to do with their right to get their money. This is apparent upon an examination of the statute. Boiled down to simplest terms the mills are required under section 902 to prove that they did not shift the *burden* of the tax to any one else. Of course, they must prove that they paid the tax. That they are ready to prove and for the present purposes it is assumed to be proved. But what conceivable connection with the mills' right to get back the money paid is there in this requirement of the Revenue Act of 1936 that the mills must show what happened to the *burden* of the tax in the entire course of their dealings with sellers, with labor, with other tax authorities, with purchasers and many others? It comes very close to a requirement that the mills prove that their profits have been no higher than the rate Congress sees fit to designate. If this condition is valid, a taxpayer may be required by some future enactment to show that he has made no profit before he can get back an erroneous overpayment of income tax. If it is valid, a prescribed schedule of wages and prices may be made the condition of recovering any payment of an unlawful exaction.

Who finally bore the burden of any tax or any other item of cost is an abstruse economic problem which no human ingenuity can solve. Apart from the fact that it has nothing to do with the right to refund and in plain language is none of the government's business, it is most unreasonable to make the plaintiffs' undoubted legal and moral right depend on their ability to prove a proposition so intangible and illusory that it is not susceptible of legal proof.

The Fifth Amendment protects the people from seizure and confiscation of their property except upon the orderly determination of legal rights. Seizure and confiscation without right are permitted if possession may be obtained only upon proof of an unrelated fact interjected after the property has been illegally taken. The Fifth Amendment protects the people against arbitrary and unreasonable enactments. Arbitrary and unreasonable enactments are permitted if one may have his own property only upon strict proof of something which is definitely in the realm of speculation and is incapable of exact proof.

The enormous wrongs involved in the propositions just stated are so apparent that Congress has attempted to befog the issue and lend apparent but specious validity to its outright violation of legal and moral rights by making its action appear to be a valid exercise of its subsidiary and incidental powers. Knowing that the right to prescribe the mechanics of refund was well established, Congress has tried to make this deprivation of rights appear to be merely a change in such mechanics. The subterfuge has not been unsuccessful. The attention of the lower courts which have upheld this legislation has been directed away from the effect and implications of Title VII as a whole. They have been led to affirm the subsidiary details of the legislative scheme without full consideration of the fact that, under the peculiar circumstances, the affirming

of the details permitted the more inclusive and more fundamental violation of natural and legal rights.

Another of the legislative devices designed to make effective the unlawful scheme of Title VII is the attempt to destroy the liability of the collectors set out in section 910. Equally with the other means employed to effect the unconstitutional purpose this provision must be expunged as an integral part of Title VII. The mills had a right of action against the collectors fully vested before Title VII became law. If the right of action was at common law, as it undoubtedly was in origin, it was one of the inalienable rights of the people which Congress is not free to destroy. If the right existed under statutes, it was one of the necessary conditions under the Fifth Amendment to the validity of the exaction, a full and adequate remedy for illegality either in the exaction itself or in the acts of the collectors making the exaction. Whichever the remedy was, Title VII takes it away without preserving even the substance of it. The new remedy held out as a substitute is not the same remedy; in most cases it is not any remedy at all, but only a remedy for the limited group who may be able to prove the new and immaterial facts required to be proved under Title VII. The destruction, after an exaction has been collected, of the remedy for illegal and unconstitutional exactions can hardly be valid unless an exaction wherein no provision was made for the correction of illegality or unconstitutionality would have been valid in the first instance. The guarantee of due process should not be any less under the protection of the court after the illegal taking than before the taking occurred.

This issue is far beyond and above any question of whether the right to sue a collector is a common-law right or a statutory right. Whatever the right against the collectors and whatever the right against the United States,

the plaintiffs had a property right and one or more adequate ways to enforce it upon its own merits against either the collector or the United States prior to the enactment of Title VII (or section 21(d) of the Agricultural Adjustment Act). If Title VII is valid, the plaintiffs now have no adequate way to assert their rights against any one upon the merits. If they have any remedy at all, it is upon the condition that they prove an elusive proposition of fact made necessary by laws passed since their rights arose, and having nothing to do with the liability of the defendants. It is the enactment as a whole which destroys the right. It is the enactment as a whole which must be declared invalid if the Fifth Amendment is to be kept effective.

The necessary result of wiping out the whole scheme of Title VII is to leave the pre-existing remedies in effect. They remain in effect for other forms of taxation. They are not repealed *in toto*. There is no new or other general scheme for obtaining refunds. The procedure which has been in effect for many years is still the procedure of refund except as it is varied directly or by implication by the provisions of Title VII in this one limited group of cases arising from the invalidation of the Agricultural Adjustment Act. Except for Title VII, these older internal revenue remedies under Revised Statutes, sections 3226, 3228 (26 U.S.C.A. 1672-3, 1433), are the remedies prescribed by section 19 of the Agricultural Adjustment Act for the recovery of floor stocks and processing taxes.

The plaintiffs made their claims under the old procedure as the procedure prescribed when the claims were made. Since section 21(d) of the Agricultural Adjustment Act and Title VII of the Revenue Act of 1936 appear to be clearly invalid and no more than successive hurdles wantonly cast in the way of taxpayers seeking their own property, the plaintiffs have continued to assert their

rights under the original procedure. There is no question about their full and complete compliance with the procedure which was originally prescribed and which is still the procedure prescribed if Title VII is invalid.

For the preservation of constitutional rights the single purpose and effect of Title VII must never be forgotten. Title VII as a whole is a scheme to legalize the illegal taking of property, and the provisions expunging the liability of collectors and requiring new claims for refund, proof as to the economic incidence of the tax, and administrative instead of judicial hearings, are but means to accomplish the scheme. The single purpose is so clear that the subsidiary means must fall as one with the invalid scheme.

The demurrers should be overruled.

Respectfully submitted,

EDWARD R. HALE,
BENNETT SANDERSON,
Amici Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE.

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HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

Brief filed by George T. Buckingham as *amicus curiae* in the above entitled case.

STATEMENT OF FACTS.

A detailed statement of facts is contained in the Petitioner's Brief. In explanation of this suit, only the following statement need be made:

The petitioner is a processor from whom, under the pretended authority of the Agricultural Adjustment Act, a considerable amount of money was collected as processing and floor stocks taxes. At the time of the payment of this money, the Act contained a provision expressly making applicable the general statutes relating to the refund of all Federal taxes. These statutes (R. S., Sections 3226 and 3228) required merely the filing of a claim with the Commissioner of Internal Revenue, and the rejection of such claim or the expiration of a period of six months, as a con-

dition precedent to the bringing of suit against the Collector. In accordance with these statutory requirements, proper claims for the monies herein involved were filed by petitioner with the Commissioner of Internal Revenue, and after the rejection of these claims, the present suit was instituted against the Collector who had illegally exacted payment of these monies. The filing of the claims and their rejection and the institution of the present suit, all were accomplished prior to the enactment by Congress on June 22, 1936, of the Revenue Act of 1936.

The United States District Court for the Northern District of Alabama sustained the defendant's motion to dismiss. This judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit but on an entirely different ground.

SCOPE OF ARGUMENT.

We discuss in this brief only two propositions:

I. Title VII is unconstitutional either because of indefiniteness or because the criteria on which refunds may be denied are wholly arbitrary and unreasonable.

II. The validity of Title VII of the Revenue Act of 1936 is not determined by the case of *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386.

These propositions are unconnected. We discuss the first in order to make clear the utter inadequacy of the vague and illusory provisions which Title VII offers to the taxpayer as a pretended substitute for the unequivocal vested right which it attempts to destroy. We consider the *Jefferson Electric* case only because it was made the basis of the District Court's adverse opinion and not because it has any real relevance to the issues involved in the instant case.

I. TITLE VII IS UNCONSTITUTIONAL BECAUSE OF INDEFINITENESS AND BECAUSE THE CRITERIA ON WHICH REFUNDS MAY BE DENIED ARE WHOLLY ARBITRARY AND UNREASONABLE.

In the case at bar, petitioner is a taxpayer from whom monies have been unconstitutionally exacted under the color of taxation. Section 910 of Title VII attempts to destroy the taxpayer's right to recover these illegal exactions from the Collector. The unconstitutionality of this inseparable section of the Title has been briefed by Petitioner. Other sections of Title VII purport to provide that the taxpayer can obtain the refund of these illegally exacted taxes from the Government, but Section 902 attaches

a series of conditions which in fact bar all such refunds. The remainder of this portion of the brief will be devoted to a consideration of Section 902 and its supplementary provision, Section 907. These sections, which embody the pretended right of refund, will be demonstrated to be completely illusory and to afford no true relief either because of indefiniteness, or because the criteria on which refund *must presumptively be denied* are wholly arbitrary and unreasonable.

We shall not discuss the unconstitutionality of these provisions in that they establish requirements which are manifestly impossible of legal proof. Nor shall we discuss the far-reaching implications of Title VII in its attempt to surround a vested right to restitution of an unconstitutional exaction, with a series of conditions that have the effect of ratifying the original illegal exaction. We do not consider whether Title VII is thus in effect a method of taxing where this Court has said that Congress cannot constitutionally tax. Nor shall we inquire into the evidence showing that the provisions of the Title have been palpably erected as a barrier to *any* refund by the Government. These points have been amply treated in other briefs.

We shall devote ourselves simply to demonstrating that the provisions of Sections 902 and 907, designed to bar refund of the tax, are either wholly uncertain and indefinite, or predicated upon considerations completely unrelated to the propriety of the refund so as to constitute the entire Title an unlawful deprivation of property within the meaning of the Fifth Amendment.

As we shall point out in a later section of this brief, this Court, in the case of *United States* v. *Jefferson Electric Company*, 291 U. S. 386, has recognized the principle that when a taxpayer has by agreement collected a tax *as a tax* from his vendee, Congress may direct the Commissioner and the courts to inquire into the existence of such a contract and may condition the granting of the refund on the

amount of the tax so collected being returned *to the vendee.* But under Title VII, as even the most casual reading discloses, the right to refund does not depend upon the existence or non-existence of any agreement between the taxpayer and his vendee, but rather upon the proof of certain facts as to the "shifting of the burden" of the tax. As will be later more fully explained, the principle of the *Jefferson Electric* case clearly bears no relation to a statutory provision that the refund of the tax to the vendor may be made to depend upon certain economic effects of the tax.

What then is the theory of Title VII? The Government maintains that it is simply that Congress may legislate to prevent "unjust enrichment." But how may Title VII be supported upon any theory of "unjust enrichment"? In the instant case the Defendant Collector unlawfully exacted from the Petitioner certain monies which were turned over to the Treasury of the United States. Can it be reasonably contended under any theory of "unjust enrichment" that either the Collector or the Government, in possession of monies *illegally exacted,* is entitled permanently to retain such monies, on the ground that to refund the monies to the taxpayer would unjustly enrich the taxpayer at the expense of a third party? Especially when no provision is made for any refund to that third party?

But let us, for the purposes of this brief, assume that Title VII may be justified upon the theory which the Government suggests; that, in other words, the equitable principle of "unjust enrichment" may be so distorted as to apply even where the alleged "unjust enrichment" arises not between the Government and the refund claimant, but between the claimant and a third party. Even with these assumptions we have admitted nothing with respect to the validity of Title VII. For, even if we grant what is probably the Government's major premise,

that Congress may legislate to prevent unjust enrichment as between a refund claimant and a third party, what must be the characteristics of such legislation? First, obviously, it must in some reasonably definite manner measure the extent of any unjust enrichment as between those parties. Secondly, it must provide that any portion of the refund which would result in unjust enrichment to the claimant must be restored to the third party.

To narrow the scope of the inquiry, we will not here argue the second requirement; since it is discussed in other briefs. We will confine ourselves merely to pointing out that Title VII, as a measure of any possible unjust enrichment, is not only hopelessly indefinite, but is wholly arbitrary and unreasonable.

A. Title VII Makes Any Refund Dependent Upon Indefinite and Ambiguous Conditions.

The Title is both complex and prolix, but the issue is relatively simple. The taxpayer, in seeking to recover these unconstitutionally exacted taxes, encounters both Section 902 and Section 907. The former requires that he must show in order to obtain a refund of any illegally exacted amount

> "That he bore *the burden of such amount* and has not been relieved thereof nor reimbursed therefor nor *shifted such burden* directly or indirectly * * *." †

The latter, Section 907, goes further and provides that, if certain facts exist, he will be presumed *either* to have borne "the burden of such amount" or to have "shifted such burden", and throws upon him the burden of disproving the presumption.

In examining these two sections, one must never lose sight of this fundamental fact: *They represent what is*

† Throughout this brief italics, unless otherwise noted, are supplied by the writer.

offered the taxpayer in lieu of his perfected vested right against the Collector which Title VII destroys. (This attempted destruction of a vested right is elsewhere shown to be clearly unconstitutional. We pass that issue here.) The refund provisions of Sections 902 and 907 must therefore be considered in the light of what they are to replace. The reasonableness of these complex provisions—offered as a substitute for a vested right but realistically intended to preclude all recovery—must be approached with this always in mind.

1. Section 902 Is Inherently Ambiguous and Uncertain.

The key to the question whether a definite and reasonable method is provided, must be found in Section 902. This prohibits the refund of any unconstitutionally exacted processing or floor stocks tax unless the claimant satisfies the Commissioner

> "(a) That he bore *the burden of such amount* and *has not been relieved thereof nor reimbursed therefor* nor *shifted such burden, directly or indirectly,* (1) through inclusion of such amount by the claimant, • • • in the price of any article with respect to which a tax was imposed • • •, or in the price of any article processed from any commodity with respect to which a tax was imposed • • •; (2) through reduction of the price paid for any such commodity; or (3) *in any manner whatsoever;* and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may *shift the burden* thereof; or
>
> "(b) That he has repaid unconditionally such amount to his vendee (1) *who bore the burden thereof,* (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

This is not the happiest or most exact language by

which to foreclose fundamental rights. Neither Section 902 nor any other provision of Title VII defines "shifting" or "passing on or back." Nor does it spell out the meaning to be given to "the burden". The basis upon which the Commissioner's determination must, in the first instance, be founded, is assuredly not certain and cannot be clearly found in Section 902. Compared with the clear right against the Collector to recover taxes illegally exacted merely by showing payment and denial of refund, the language of Section 902 enshrouds any possible refund in a cloud of impenetrable smoke.

What meaning can be attributed to it? It speaks both of "bearing" and "shifting" the "burden" of the tax. If this is to mean that the tax was shifted merely because the taxpayer received more for his finished product or paid less for his raw material during the tax period, we shall demonstrate later that these facts of themselves, even if provable (which we deny), bear no relation to any theory of unjust enrichment nor do they have any reasonable relation to the final effects of the tax upon the taxpayer. If, on the other hand, the vague language of Section 902 is intended to deal with the ultimate "incidence" or pressure of the tax, we do not here argue, but in another *amicus* brief it is clearly shown, that the eventual "incidence" or pressure of a tax completely eludes demonstration—even granting that any inquiry as to such "incidence" would be relevant in determining the propriety of a refund. Thus, the terms used in Section 902 can have, like the language of "Humpty Dumpty", any meaning which the Commissioner finds it necessary to give them. The latitude thus afforded the Commissioner, the Board of Review, or the courts, in barring a refund, is virtually limitless.

In short, Section 902 may mean either something which, even if provable, has no relation to any theory of unjust enrichment; or it may mean "incidence" of the tax which,

assuming that it is relevant, is wholly impossible of legal proof; or it may mean nothing. The only thing certain about it is that its meaning is uncertain, vague and ambiguous. Unless the Commissioner, his own Board of Review, or the courts, are to be given unlimited latitude *to legislate* and themselves determine the various circumstances under which a taxpayer—from whom monies have been unconstitutionally exacted and who has a clean-cut right to recover—can now get a refund, Section 902 represents little more than an indefinite and confusing attempt to preclude *any* recovery.

2. The Presumption Specified in Section 907 as a Supposed Method of Proof Throws No Light on the Meaning of Section 902.

It has been suggested, however, that the meaning to be given to this inherently ambiguous language of Section 902 can, by some mystic alchemy, be distilled out of Section 907. Let us look at that Section.

Section 907 first prescribes a *presumption* to be employed by the Commissioner in initially determining that the taxpayer did *not* "bear the burden of such amount". Without attempting to state in plain English what it is that must *ultimately* be proved, this section permits proof of certain arbitrarily selected economic effects to be made the basis for *presuming* that Section 902 is satisfied and the refund cannot be allowed. This does not throw any great light on what Section 902 means, nor can a presumption from particular evidentiary facts clear up ambiguity as to the meaning of the controlling ultimate fact. A presumption that one injured at a railroad crossing was exercising due care may be useful, but it does not throw any light on the entirely unrelated, but material, issue of the standard of care imposed upon the railroad. Or if a statute prohibited the selling of a commodity except

in "consumer-sized packages", and further provided that if the average margin per package sold remained unchanged, the seller would be *presumed* to have violated the Act, the presumption would certainly throw no light on whether a one, five or ten pound package was specified, nor would it cure the inherent ambiguity in the substantive prohibition.

This is perfectly illustrated by subsection (e) of Section 907. That subsection provides that the taxpayer may, if he can, rebut the presumption by introducing evidence as to the existence or non-existence of the economic effects giving rise to the presumption. But, the taxpayer may, in rebuttal, introduce not only such evidence, but may, in order to show that Section 902 is not applicable, introduce almost anything under the sun. For subsection (e) provides that rebuttal evidence may include testimony on the facts supporting the presumption "*but shall not be limited to*—" such facts. In other words, the *presumption* in Section 907 in no way confines the meaning to be given to Section 902, and any argument that the inherent vagueness of Section 902 is in any way cured by the later section, is completely met by subsection (e)—which says, in effect, that in meeting the presumption that Section 902 bars refund, there are no limitations (and likewise no clear directions) concerning other proof.

B. The Presumption Specified in Section 907 Not Only Improperly Throws the Burden of Proof on the Claimant, But Is Arbitrary and Unreasonable.

We have shown that under Section 907 proof of certain economic effects causes a *presumption* to arise that Section 902 is applicable to bar the refund. It has been seen that this presumption does not clarify what is to be proved. But Section 907 is important not only because it fails to clarify the basic defects in the substantive provision,

Section 902, but also because the presumption created is virtually *irrebuttable*, and is raised by a comparison of arbitrarily selected facts which bear no relation to the ultimate economic effects of the tax. Section 907 is thus of itself invalid, and invalidates Section 902.

Stated more simply, not only is the claimant, who prior to the enactment of Title VII had a clear and perfected right, confronted with a hopelessly vague standard, but Section 907 unreasonably creates a presumption, from arbitrarily selected and unrelated facts, that he cannot recover unless he can succeed in the impossible task of first explaining the ambiguities in Section 902 and then refuting the irrefutable. To extend an earlier metaphor, Section 902 creates an impenetrable smoke cloud of ambiguity: Section 907 tells the taxpayer that unless he can point precisely to where his own money is hidden in the smoke, he is not entitled to get it back.

Let us, however, examine the evidentiary basis on which this irrebuttable presumption can be raised. It is whether the average margin *per unit* between the "cost" and gross sales price of the commodity processed was or was not lower during the tax period than the average margin during the "period before and after the tax". For the purpose of determining any increase or decrease in this so-called "average margin", an elaborate formula is prescribed for comparison of the average margins *per unit* during the tax period with the margins during a two-year period prior to the imposition of the tax, and during the six-months from February to July, 1936.

1. The Factors Creating the Presumption Are Wholly Arbitrary.

In this jungle of unfamiliar concepts, it is important to understand, wherever possible, what the terms employed shall mean. The "average margin" is roughly the average difference between the *gross sales value per unit* of all articles processed during the "period of the tax" and the "*cost*" of such articles. Briefs filed by other *amici* demonstrate beyond the shadow of a doubt the wholly arbitrary character of the definition requiring that *sales value per unit* be calculated on a monthly basis, and the fantastic results that can be derived from applying either the actual or replacement cost formulae specified. We desire here simply to indicate that "*cost*" is not to mean cost as a business man knows it—including raw material cost, direct and indirect labor, overhead, etc—but merely the cost of the raw commodity. The processing tax paid on the processing of the particular commodity may, however, be added. Without delaying too long, it should be observed here that any increase in these other commonly accepted costs, such as increase through higher wages, greater overhead, diminution in plant utilization, etc., which anyone with the rudiments of business experience knows can equal and exceed the margin between raw material cost and selling price, are to be wholly disregarded. In other words, it is arbitrarily assumed that all costs, other than for raw material, remained constant.

Similarly, it is not necessary to demonstrate at length the arbitrary character of selecting for any and all businesses a particular two-year period prior to a tax* and a

* It is illuminating to observe that in Section 501 (f) (1) of Title III, which imposes a so-called "windfall tax" on somewhat the same theory or lack of theory, the "period before the tax" is taken as *six years*, not *two years*. This comparison strongly corroborates the suggestion that the selection of the two-year period in Title VII is founded on no real economic theory, and is at best an arbitrary guess. Compare *Senate Rep. No.* 2156, 74th Cong., 2nd Sess., p. 25.

In its Brief in the Circuit Court of Appeals for the Seventh Circuit in

six-months period following it. The existence during this two-year period of a world-wide depression, in which selling prices crowded down upon basic raw material costs and in which, in many cases, ordinary competitive sales were made under virtually distress conditions, is blithely disregarded in these required definitions.

In short, the presumption that refund will be precluded under Section 902 is raised by this arbitrary test: If the margin *per unit* between the *"cost"* of the raw material entering into a processed product and the selling price *per unit* of such product was equal to or greater than the same margin *per unit* during an arbitrarily selected prior period, the refund cannot be allowed. Thus, if an article selling at $1.00 had 40c worth of raw material in it during the period preceding the tax, and the same article selling at $1.50 during the tax period had 90c worth of raw material in it, the tax may not be refunded. In Petitioner's Brief it is amply demonstrated that this so-called presumption is in fact irrebuttable. We content ourselves with taking it for what it professes to be and showing that the facts on which it can be raised bear almost no relation to the question whether the taxpayer's position was or was not changed because of the illegal exaction.

Necessarily, the reasonableness of this practically irrebuttable presumption must be examined, that is, the validity

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Kingan & Co. v. *Smith, Collector*, No. 6118, the Government stated in respect to the six-year period in Title III:

> "Section 501 (f) defines average margin to mean the average difference per unit between cost of the commodity and the selling price of the articles processed from it *over a representative period prior to the imposition of the tax*. To insure that this comparison is wholly fair to the taxpayer, the *representative period* consists of the *six taxable years* prior to the imposition of the tax. Section 501(f)(1). In the case of the appellant this includes two years (1927-1928, 1928-1929) at the peak of the business cycle, two of receding activity (1929-1930, 1930-1931) and two at the trough of the cycle (1931-1932, 1932-1933." (p. 87)

If six years are so truly representative, are the two "trough" years alone equally representative?

of providing that, in the absence of anything else the meaning of which can be captured or defined, the fact that the average margin *per unit* between *selling price* and *cost* remained the same is sufficient to support a denial of the refund.

2. The Average Margin Per Unit Formula Is Not Determinative of the Tax Burden and Does Not Show "Who Paid the Processing Tax."

We have already seen that the extraordinary definitions of "cost" exclude direct and indirect labor costs, overhead, and other cost factors which ordinary business sense indicate should be included. Likewise, we have pointed out the arbitrary selection of a prior comparative period which, of itself, would suffice to render these so-called presumptions wholly arbitrary. But, going right to the heart of the problem, it is demonstrable that consideration only of the spread between the *cost* and *selling price* of a *single unit* is completely inadequate to determine where, in the commonly accepted economic terminology, the "incidence" of the tax finally fell.

(a) *Lack of Change in Average Margin, Reflecting an Increased Selling Price Per Unit, Does Not, in the Absence of a Fixed Demand, Indicate Greater Total Revenues.*

It is perhaps a commonplace that in a competitive market higher prices do not necessarily mean that the seller can market the same total quantity of products and thus secure larger total revenues. This fundamental economic fact invited inquiry in connection with processing taxes long before the passage of Title VII. Obviously, the Agricultural Adjustment Administration was interested in the question. In its report to Congress in 1934, the Agricultural Adjustment Administration stated that

> *"The question 'who pays the processing tax' cannot*

be answered by a mere examination of the change in producer, wholesale and retail prices and in the final spread between them. It is true that commonly this question is answered in this partial way without taking into account such facts as the volume of supplies, the rate of consumption, the amounts paid by consumers, the total returns to producers, the benefit payments made to producers from the proceeds of the processing tax, the stimulus to general business activity through increased farm purchasing power, and the improvement in the credit structure of the country through the enhancement of agricultural values." (Agricultural Adjustment, p. 220.)

The inter-relation of supply and demand and price upon the amount of goods that can be marketed has been very clearly stated by Secretary Wallace in a recent announcement concerning the new proposed sugar processing tax. He said

> "Since in most instances the total cost of production (including duties and taxes) tends to be related to selling price, there is generally assumed to be a direct causal relation between cost and price; *but in fact the cost of production affects price only indirectly through its effect on supply.* If the costs of production exceed price, there is a tendency for production to decrease, and the decreased supply causes an increase in price. *Thus it will be noted that the quantity of the supply, and not the cost of production, is the direct causal factor in determining price;* and factors other than cost of production—in this case quotas—can supersede cost of production in determining supply, and hence in determining price."

This clear statement strikingly indicates the fundamental fallacy in Section 907 and its basic injustice in employing merely the average margin *per unit* between *cost* and *selling price.* In other words, if any processor raises the price of the finished product, he cannot, of course, expect to sell as large a quantity unless there is a fixed demand. This axiom of marketing is completely ignored in Section 907. If, because of the processing tax the average sales price

per unit were increased, the number of units sold would ordinarily decrease. More low-price automobiles can be sold than high-price automobiles, and even if the margin on an automobile were tremendously increased because of the higher selling price, it does not at all follow that the manufacturer in question would be better off. This simple rule, completely ignored in Title VII, was so well understood by the economic advisers to the Agricultural Adjustment Administration and other Government economists that further brief illustrations can best be drawn from their own writings. Messrs. Ezekial and Bean, Economic Advisers to the Agricultural Adjustment Administration, have written that

> "The extent to which prices to consumers can be raised depends upon the consumers' willingness and ability to pay a higher price without reducing purchases." (Ezekial and Bean, *Economic Basis for the Agricultural Adjustment Act*, p. 59.)

In the case of cotton, purchases are immediately reduced by a rise in price since the demand for cotton textiles is in economic terminology exceedingly "*flexible.*" Thus, the Agricultural Adjustment Administration in its report in 1934 itself stated:

> "From the relation of domestic cotton consumption to cotton prices and to business activity during the last 13 years, it is estimated that the processing tax, if all passed to consumers, might reasonably be expected to reduce domestic consumption for the season around 400,000 to 500,000 bales from what it would have been without the tax." (*Agricultural Adjustment*, p. 239.)

That consumption was in fact reduced by the tax is indicated by a recent study published by the Brookings Institute in which the author, commenting on the relation between cotton prices and consumption, offers the generalization that

> "This relationship indicates that removal of the processing tax in 1933-34 would have caused an increase in consumption of cotton in the United States of 455,000 bales, and that if our cotton program had not been un-

dertaken and farm prices had averaged 6.4 cents per pound, consumption of cotton in the United States would have been 880,000 bales larger than it was." (Richards, *Cotton and the AAA*, p. 379.)

It is apparent, therefore, that if a cotton processor had been free to raise the price of his finished articles to his vendees, he would have sold less of his product. The processor's problem, of course, was individually to fix his price within the limits of competition at the point where the maximum net profit might be expected. But he did not thereby relieve himself from ultimately paying the tax, if that expression is to be given any real meaning.

(b) *Lack of Change in Average Margin Per Unit Does Not Reflect Effects of Higher Prices and Contracted Markets.*

Economists seem fairly unanimous that the imposition of a tax, resulting as it does in the rise in the cost of production, tends to force out of business the marginal producer. There seems general agreement that the imposition of the Agricultural Adjustment Act resulted in the insolvency of many smaller processors. To such an enterprise the consequences of the tax cannot be measured by a mere consideration of changes in the margin *per unit* during the tax period. To refuse a refund of the tax money illegally exacted, merely on the ground that such a business may have raised the price of its finished articles along with the general market, or paid a somewhat lower price for its raw materials, is obviously arbitrary and unreasonable.

With the general contraction of demand during a period of depression and the consequent increased overhead *per unit*, it was incumbent upon processors selling in a competitive market to maintain and, if possible, to increase demand. The processing tax necessarily saddled

the processor with additional costs. To conclude merely from his ability to maintain the average margin *per unit* between raw material cost and selling price that the processing tax left his position unchanged, is virtually to assume without warrant that demand remained constant. This not only is wholly fallacious and unreasonable as an economic theory, but as has already been seen is also contrary to fact.

(c) *Lack of Change in Average Margin Per Unit Does Not Reflect Losses Through Invasion By Untaxed Competing Commodities and Their Products.*

Related to the loss of sales which ordinarily follows an increase in prices in a competitive market is the temporary or permanent loss of markets to competing products manufactured from untaxed commodities. This well known business fact was not entirely disregarded even in the original Agricultural Adjustment Act. For Section 15 (d) of that statute authorized the imposition of so-called "compensating" processing taxes on any competing commodity where the Secretary found that the taxed commodities or their products were suffering disadvantages in competition because of "excessive shifts in consumption." A very brief history of the use of this Section illustrates not only that increased prices occasioned by processing taxes may cause an invasion by competing untaxed commodities, but also indicates the impossibility of measuring the burden of such shifts. It likewise demonstrates that where products sold compete on a functional rather than a style basis, such shifts are likely to be fairly rapid, closely dependent upon selling price, and possibly irretrievable. We need not argue that the agricultural commodities subject to processing taxes were largely manufactured into staple products, principally articles of food or ordinary wear, in which

use rather than style is the predominate consumer consideration.

Curiously enough, the compensating tax provision in the Agricultural Adjustment Act was operative only where "excessive shifts in consumption" were to be found. Within a very few months after the promulgation of the cotton processing taxes, the Secretary was asked to consider the loss of markets for cotton products and to impose compensating taxes on products of paper, rayon, jute and other vegetable fibres. Extensive hearings were held in July and August, 1933, but after months of study the Secretary could not make up his mind. The cotton textile industry continued to complain of severe losses of markets. In October, 1933, further extensive investigations and hearings were held which resulted in the imposition of compensating taxes on various paper and jute products. Few were satisfied with the results of these investigations. The cotton textile industry was insistent that large segments of its markets had been lost. The industries upon which compensating taxes had been placed shortly discovered that they in turn were losing their markets to other commodities not subject to compensating taxes. Frequent re-examinations and revisions and exemptions were necessary throughout the period of the tax. We need not explore the detailed repercussions of this activity in respect to cotton and products competing with it, for it is generally admitted that the shifts caused and the readjustments attempted occasioned changes and losses in the marketing of all the commodities involved that still persist.

In the case of the processing tax on hogs, not even limited attempts at correction were successful. Increased prices occasioned largely by the tax resulted in elaborate investigations by the Secretary. It was demonstrated that in place of purchasing higher priced pork products, the consumers were turning to other foods. But all efforts

definitely to discover just where and to what extent admittedly large market sales of pork products were seeping, proved unavailing. In turn, the inquiry was directed to beef, mutton, lamb, fresh fish, canned fish, poultry, eggs, etc. Certain it was that consumers were free to purchase lower priced foods and to a large extent were doing so. Whether such adjustments resulted in permanently changed purchasing and eating habits no one can tell.

All of this experience demonstrates the unreasonableness of saying that merely because the margin between the cost of the raw commodity and the average selling price *per unit* of a particular product manufactured from a taxed commodity remained unchanged, the processor's position was not affected by the tax. It likewise strikingly shows the utter injustice of *presuming* the conclusion against him and throwing upon him the burden of disproving such an unwarranted and irrebuttable presumption.

C. Title VII Is Unconstitutional Because It Deprives the Claimant of Property Without Due Process of Law.

In conclusion, passing all other questions of constitutionality, we have seen that the refund provisions of Title VII are offered to the taxpayer in lieu of his perfected vested right against the Collector which Title VII destroys. An examination of these refund provisions clearly shows that the conditions upon refund imposed by Section 902 are inherently ambiguous and uncertain, and afford to the Commissioner, his Board of Review, and the courts a degree of latitude which virtually would require them to determine for themselves the circumstances under which a taxpayer can obtain a refund. We have seen further that the presumption specified in Section 907, as a supposed method of proof, throws no light upon the meaning of the inherently ambiguous language of Section 902.

But even more strikingly, the *presumption* specified in Section 907 not only improperly throws the burden of proof on the claimant but is created merely by the comparison of arbitrarily selected facts which, even if provable, would bear no reasonable relation to the ultimate economic effects of the tax. The most cursory examination discloses that the definitions of the factors giving rise to the presumption are wholly arbitrary. In addition, these factors relate solely to the question whether the average margin *per unit* between selling price and cost remained unchanged. Both history under the processing tax and economic theory combine to prove that lack of change in average margin *per unit* does not indicate greater total revenues, does not reflect the effects of higher prices and contracted markets, and does not take into account losses through invasion by untaxed competing commodities and their products—in short, the average margin *per unit* formula is wholly unrelated to the real effect of the tax upon the taxpayer. As a complex substitute for a simple right to the return of an unlawful exaction, the conditions imposed are so vague and the irrebuttable presumption so unreasonable as to compel the conclusion that their real design is to bar any and all recovery.

II. THE VALIDITY OF TITLE VII OF THE REVENUE ACT OF 1936 IS NOT DETERMINED BY THE CASE OF UNITED STATES v. JEFFERSON ELECTRIC MANUFACTURING COMPANY, 291 U. S. 386.

In the case of *United States* v. *Jefferson Electric Company*, this Court decided that Section 424 of the Revenue Act of 1928 was a valid enactment. That provision is set forth in full in Appendix C, p. 37.

Briefly, Section 424 provided that no refund should be made of any automobile accessory tax until it was established that the taxpayer had not "collected" the tax from his vendee or, if he had "collected" the tax, had reimbursed, or would give bond to reimburse, his vendee.

A. By Treasury Regulations Under the Original Tax Act With Respect to Which the Refund Statute Considered in That Case Operated, Vendors Were Permitted to Collect the Tax from Their Vendees So Long as the Tax Was Treated as a Segregated Item.

To understand the opinion of this Court in the *Jefferson Electric* case, it is necessary to consider not only Section 424 but also the original tax act (Section 600 of the Revenue Act of 1924), the misconstruction of which made necessary the refund provision.

Section 600 of the Revenue Act of 1924 imposed a tax equal to 5% of the "sales price" upon the sale of "automobile accessories" to certain classes of customers. This tax was payable by the sellers, who were in the first instance the manufacturers, and the imposition of the tax necessarily increased their manufacturing costs. In view of this fact, the sellers desired, if possible, to secure the payment of the

tax by the purchasers, but this could not be accomplished simply by an increase in price, since any price increase would automatically increase the basis upon which the tax was computed.

The sellers, therefore, inquired of the Bureau of Internal Revenue whether they could "collect" the tax from their vendees without having to pay tax on the additional amounts received. In answer to these inquiries, the Treasury Department promulgated Regulations 47, in which it was indicated that the sellers might "collect" the tax from their vendees without causing an increase in the tax if, and only if, at the time of sale, they notified the purchaser that they were "collecting" the tax as an item separate from the selling price of the article.

These Regulations prescribed in detail that

1. The "tax" could be "passed on" or "shifted" only by a sales agreement between seller and vendee. "Passing on" and "shifting" could not be accomplished automatically, and in the absence of an agreement.
2. There must be a "sales price", as such, fixed and recognized by such agreement.
3. There must be a "tax" amount, as such, fixed and recognized by such agreement.
4. Both "sales price", and "tax" must be separate amounts, and must be so recognized and treated by seller and vendee, in the sales agreement.
5. In the absence of such a segregation in the agreement, "passing on" or "shifting" was legally impossible and could not be recognized.

In order to make these principles print plain, "examples" were given. It was pointed out (Regs., Secs. 4546-7, Appendix A, pp. 33, 34) that if a seller invoiced his sale as $100 for the "sales price" and $5 for tax, and thus received $105 from his vendee, then the seller had "shifted" the "tax burden", and would be required to turn over

to the Government only the $5 the seller had "collected" from the purchaser as tax.

But (Sec. 4549, Appendix A, p. 34) if the seller merely invoiced the article at $105, and said nothing to the vendee about tax, then the seller must pay $5.25 as tax, because in that event the $105 must be regarded as "sales price", distinct from any tax *buried* in it.

And to make the distinction so clear that none could mistake it, the Treasury Department, fully recognizing the distinction between (1) a sales tax which is "collected" from the purchaser *as a tax, i. e.*, paid by the purchaser in addition to the sales price; and (2) a tax which is one of the components of seller's cost and not separately dealt with, but, together with gas, oil, insurance, and hundreds of other cost items, in some *unmeasured* degree influences the sales price, reiterated (by Sec. 4552, Appendix A, pp. 34, 35) that the "underlying principle" involved in these "examples" is,

> *"that the price constitutes the basis for determining the tax, and must be specified."*
>
> *"As the price itself forms the basis for computing the tax, it is just as important that this item be mentioned, as that the tax be specified • • • in other words both price and tax must be designated and specified."*

B. The Distinction Made by These Regulations Between a Tax "Collected" as a Tax and One Buried in a Sales Price Is Also Evident in the Genesis of Section 424.

After these Regulations had been in force for a long time, there were several court decisions to the effect that taxes had been paid on certain articles which were not "automobile accessories" within the meaning of Section 600. It being apparent that, if these decisions were upheld, refunds would be payable to many manufacturers who

had availed themselves of the opportunity provided by the Regulations and had "collected" the tax from their vendees, the then Secretary of the Treasury wrote a letter to the Chairman of the Committee on Appropriations explaining the situation and suggesting a provision specifically relating to such refunds. The letter is set forth as Appendix B, p. 36. It was in response to this letter that Section 424 was enacted, as a part of the Revenue Act of 1928.

The letter shows that the selling price, and the tax, are considered as separate amounts, and that the Secretary had in mind only those cases in which the seller had *collected* the tax, as such separate amount, from the purchaser.

The letter, referring to the Regulations, discussed refunds "in these cases", *i. e.*, where the tax as a separate amount, distinct from the purchase price itself, had been collected by the seller from the purchaser. No other conclusion can be drawn from the language.

C. This Distinction Was Discussed and Accepted in Other Cases Prior to the Jefferson Electric Case.

The distinction illustrated by examples in the Regulations under Section 600 and clearly recognized in the Secretary's letter had been accepted and discussed by this Court long prior to the *Jefferson Electric* case.

In the case of *Lash's Products Co.* v. *United States*, 278 U. S. 175, this Court had occasion to deal with the refund of an illegal excise tax levied on sales of "soft drinks," which clearly presented this distinction. The tax was levied on "soft drinks, sold by the manufacturer," and the tax imposed was a "tax equivalent to ten per centum of the price for which so sold." The manufacturer sold cider for "the sum actually received by it for the goods sold."

The seller did not bill the tax as a separate item, and did not "collect" the tax from the purchasers, as a separate amount. It simply sold cider at a fixed price. But the seller "notified the customers beforehand" that it had paid the 10 per cent tax. The seller contended that by reason of this notice, it had "passed the tax on," that it should therefore only have been taxed on the selling price less the tax, and sued for refund of the difference.

This Court said, in rejecting the seller's contention (p. 176):

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. *Heckman & Co.* v. *I. S. Dawes & Son Co.*, 56 App. D. C. 213, 12 F. (2d) 154. *The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all.* • • •
>
> "*The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price,* and if the statute were taken literally, as there would be no reason for not taking it if it were now passed for the first time, there might be difficulty in accepting the commissioner's distinction *even if the tax were made a separate item of the bill.*"

Prior to the decision in *Lash's* case, the distinction which this Court made in its opinion in that case had been pointed out by Mr. Justice Cardozo, then Chief Judge of the Court of Appeals of New York, in the case of *Wayne County Produce Co.* v. *Duffy-Mott Co., Inc.*, 244 N. Y. 351. This case is of particular interest in that even in the absence of a statute it permitted a purchaser to recover from his vendor the amount of tax which had been refunded to the latter and which had been specified at the time of sale *as a separate item distinct from the sales price.*

The plaintiff had bought from the defendant a quantity of sweet cider, the price of which was stated to be 14½

cents per gallon, subject to a discount, plus the manufacturer's war tax of 10 per cent, which tax was to be paid in full without discount. After a determination that sweet cider was not subject to the tax, the amount paid to the Government was refunded to the seller. The purchaser then brought suit.

The court stated:

> "We think the plaintiff must prevail. *This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore* v. *Des Arts*, 1 N. Y. 359. This is a case where the promise of the buyer is to pay a *stated price*, and to put the seller in funds *for the payment of a tax besides.* In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise. • • •
>
> "The contract therefore, in effect, was this and nothing more, that whatever moneys were necessary for the payment of a tax would be furnished by the buyer."

D. This Distinction Was Recognized in the Jefferson Electric Case.

In the light of the facts as to the origin of Section 424, the Regulations under Section 600 and the prior decisions involving similar questions, this Court in the case of *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, considered the validity of Section 424. A decision was reached and an opinion was written.

The decision, so far as it has ever been assumed to be relevant to the question at issue, was simply that Section 424 was valid, since it did not destroy the taxpayer's right to refund but merely made certain that the refund would go to the one who was in fact the actual taxpayer.

In discussing the case, however, this Court did not follow the phrasing of the Act but used language which had

apparently been suggested in the Solicitor General's brief. Thus this Court discussed the question raised by Section 424 in terms of whether the plaintiffs had "shifted" or "passed on" or "borne the burden" of the tax, stating that

> "If the taxpayer has borne the burden of the tax, he can readily show it." (p. 402)

This statement is itself clear evidence that the Court was concerned only with the question whether the taxpayer had "collected" the tax, *as a tax*, from its vendee, *for this was obviously the only fact which the taxpayer could "readily show."*

Elsewhere in its opinion this Court confirms this meaning beyond all possible doubt. In the *Jefferson Electric* Case the plaintiff's invoices had, during part of the taxable period, recited

> "On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21 of amount indicated equal price."

As to this the Court said (p. 405):

> "• • • If by its invoices the plaintiff represented to its purchasers that the amount shown thereon included the tax as well as the selling price, and if it returned that amount less the tax as the selling price, and caused the tax to be computed on that basis, it can not be heard to say, in the absence of other controlling circumstances of which there is no finding, that it did not collect the tax from the purchasers but itself bore the burden thereof."

The American Chain Company, plaintiff in another suit heard and decided with the *Jefferson Electric* Case, had reduced its sales price by the amount of the tax and then stamped its invoices and bills so as to indicate that of the amount charged the customer, 1/21 part was for payment of the sales tax in question. Thus the purchaser paid no more than before, but the seller saved itself paying a tax upon a tax. This Court held (p. 409):

> "• • • It is of no importance that the prior sales

> price had been reduced by the amount of the tax, for under the taxing act the tax was to be computed on the price for which the articles actually were sold and not on some prior and discarded price."

In other words, this Court was not concerned with any evidence other than whether the taxpayer had segregated the tax as a separate item at the time of sale. Obviously then the sole consideration was whether the tax had been collected as a *tax* and not whether the taxpayer had borne any vague economic "burden."

When, therefore, this Court spoke in terms of whether the taxpayer had "borne the burden of the tax" or had "shifted the burden to the purchasers" it was clearly referring to the procedure established by the Regulations and recognized in prior decisions of this Court itself. If the taxpayer had not "collected" the tax—in the language of Section 424—or "shifted" the tax—in the phrasing of this Court—then obviously he could readily show this, since all that would be necessary would be a reference to the invoices used. And in the *Jefferson Electric* Case itself this was the only evidence considered.

E. This Distinction Has Been Consistently Upheld to the Present Day.

The distinction implicit in the *Jefferson Electric* case has been consistently recognized and upheld to the present day. Even so recently as December, 1936, it was set forth by learned counsel for the Government in their brief filed in the case of *Liggett & Myers Tobacco Co.* v. *United States*, October Term, 1936, No. 161, decided by this Court in favor of the Government on January 4, 1937.

In the *Liggett & Myers* case, the question for determination was whether tobacco sold to the Boston State Hospital was exempt from a Federal tax on tobacco manufactured in the United States and sold by the manufacturer. In arguing against the plaintiff's contention that such tax

was in effect, an imposition upon the State, counsel for the Government asserted that the tax did not burden the State since it was not a sales tax but was rather a tax on manufacture.

On page 16 of the Government brief it was asserted:

> *"The tax was a prior ordinary burden of taxation, and, like an income tax or a property tax, represented a part of the manufacturing cost, and attaching to the article prior to sale, it is not retroactively invalidated merely because a sale is later made. Cornell* v. *Coyne,* 192 U. S. 418. *The vendee neither directly nor indirectly paid the tax, as a tax, but paid a fixed price which might or might not have included the full manufacturing cost of the article including the manufacturing tax thereon.* Cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176."

The Government further argued (p. 27):

> "Should the Court, for any reason, rule against the Government, then, of course, only one of the parties petitioner can recover judgment. This is a case for the recovery of taxes alleged to have been overpaid. The tax is imposed upon the Liggett & Myers Tobacco Company. That Company is the only party recognized by the statutes dealing with refund claims and suits to recover. Any judgment against the Government should, therefore, be in favor of Liggett and Myers. *Indian Motocycle* v. *United States, supra; Panhandle Oil Co.* v. *Knox, supra; Builders' Club of Chicago* v. *United States,* 14 F. Supp. 1020 (C. Cls.). *Serious administrative difficulties might arise if parties other than the taxpayer were permitted to file claims and bring suit."*

It would appear that the Government's brief in this case contains the most recent and most eloquent advocacy of the distinction which we are now asking this Court to recognize.* And it is significant that this Court's decision in the *Liggett & Myers* case was in favor of the Government.

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* The case of *Casey Jones* v. *Texas Textile Mills, Inc.*, No. 8166, decided in January, 1937, in the Circuit Court of Appeals for the Fifth Circuit, is another recent discussion of that distinction. The Texas Mills paid processing taxes under the Agricultural Adjustment Act. It sold products

F. Title VII Is Not the Legal Equivalent of Section 424 Passed Upon in the Jefferson Electric Case.

The foregoing discussion of the *Jefferson Electric* case —the taxing statute there involved, the Regulations issued under it, the remedial legislation, and the decision of this Court—makes it abundantly clear that in that case the manufacturer-taxpayer had, by agreement, collected the tax from his vendee and that this Court recognized, and in later decisions affirmed, the distinction between so collecting a tax separate and apart from the sales price and merging the tax along with all other cost factors in the sales price.

The opinion of the District Court in the present case that the validity of Title VII is controlled by the opinion of this Court in the *Jefferson Electric* case, obviously ignores this basic distinction. For it is clear that the refund under Title VII is not conditioned upon the taxpayer having by agreement collected the tax from his vendee, but is made dependent upon whether the Commissioner decides that the taxpayer raised the *selling price* of the manufactured article or paid a lower price for his raw material. Section 902 pro-

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to a customer. The court held that there was *no contract* in force between the processor and the customer as to who would pay the tax, and that in the absence of such an enforceable contract, "*the tax was buried in the price*", and could not be recovered by the customer. The court said:

> "In sales of this kind, if the price agreed upon is understood by the parties to exclude the tax, and the buyer agrees to put the seller in funds for payment thereof, and later the seller is relieved of the duty of paying the tax, the buyer is entitled to recover the amount paid in excess of the price. *Wayne County Products Co.* v. *Duffy Mott Co.*, 244 N. Y. 351, 155 N. E. 689. However, if there be no agreement concerning the tax, no such right accrues to the buyer, even though the price paid includes a tax erroneously believed by the seller to be due. *Lash Products Co.* v. *United States*, 278 U. S. 175, 73 L. Ed. 251, 49 Sup. Ct. 100, citing *Heckman and Co.* v. *I. S. Dawes and Sons Co.*, 12 F. (2d) 154. *In the first case the tax is separate and apart from the contract price, while in the latter the tax is said to be buried in the price. These results have been reached in cases where the parties did not enter into any agreement concerning their rights in the event of the invalidity of the tax. Their intentions and obligations have been determined from the form of the transaction and the situation of the parties.*

hibits refunds unless the taxpayer can show to the satisfaction of the Commissioner

> "(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly • • •".

The variety of meanings that can be given to this vague language and its basic ambiguity have already been discussed. But it is obvious even from a casual reading of the Title that the right to the refund has no relation to the existence or non-existence of any agreement relating to the tax between the vendor and his vendee, that is, to the segregation of the tax, *as a tax,* from the selling price. In short, in the *Jefferson Electric* case this Court was dealing with a segregated sales tax. In the present situation, to use the language of the Government's brief in the *Liggett & Myers* case, *supra*, "the tax was a prior ordinary burden of taxation and, like an income tax or property tax, represented a part of the manufacturing cost • • • attaching to the article prior to sale". While it is true that this Court did use the phrase "shifted the burden" in the *Jefferson Electric* case, it is a commonplace that the descriptive language in any opinion has reference solely to the facts involved in the case before the Court.

The *Jefferson Electric* case does not support Title VII. No support for that Title can be found in any decision of this Court.

Respectfully submitted,

GEORGE T. BUCKINGHAM.

APPENDIX A.

Regulations Under Sections 600-605.

REGULATIONS 47.
(Revised August, 1924)
Relating to
Excise Taxes on Sales by the Manufacturer
Under
Section 600 of the Revenue Act of 1924.

ART. 3. 4542. *Basis of Tax.* The tax is imposed on the sale by the manufacturer and should be returned and paid by him whether the sales price is actually collected or not. *It is measured by the price for which the article is sold* by the manufacturer and not by the list price where that differs from the actual sales price. If the price of a taxable article is increased to cover the tax, and the article is sold at such price, including the tax, the tax is on such increased price.

4543. The manufacturer may reimburse himself in the amount of the tax by agreement with the purchaser in the following manner: (a) by quoting the selling price and the tax in separate and exact amounts, and where invoices are rendered, by segregating these amounts on the invoices as outlined in examples (1) and (5) below; or (b) by stating to the purchaser in advance of the sale what portion of the quoted *charge* represents the price charged for the the article and what portion represents tax, and where invoices are rendered by invoicing in the manner outlined in example (2) below, in which case the amount of the tax need not be included in computing the tax.

4544. Where goods are ordered direct from the manufacturer with no agreement as to price, the tax is based on the amount billed or invoiced to the purchaser as the selling price. Mere statements or agreements that the quoted or contract price includes the tax do not operate to exclude any part thereof from tax, unless the price is billed in the manner outlined in example (1), (2), or (5) below.

4545. Where a lump sum is specified as the price of a taxable article or articles, and other articles not taxable and not a component part of the taxable articles are included in the price, the tax attaches to the entire amount unless the selling prices of the taxable and nontaxable ar-

ticles are segregated. In such case the tax will be measured by the price specified as the selling price of the taxable article or articles (examples 3 and 4). *The following examples illustrate the method by which the manufacturer may separate the tax from the selling price in invoicing goods to the purchaser:*

4546. EXAMPLE (1). A, THE MANUFACTURER, QUOTES A SELLING PRICE TO B OF $100 AND BILLS THE GOODS TO B AS:

"ARTICLE NO. 1, SELLING PRICE, $100; TAX, $5."

4547. EXAMPLE (2). A, THE MANUFACTURER, QUOTES A CHARGE OF $105, STATING THAT 20/21 OF THE CHARGE REPRESENTS THE PRICE AND 1/21 REPRESENTS THE TAX, BILLING THE GOODS TO B AS:

"ARTICLE NO. 1, CHARGE $105, 20/21 OF THE TOTAL REPRESENTS PRICE, AND 1/21 REPRESENTS TAX."

THE TAX IN SAMPLES (1) AND (2) IS COMPUTED ON $100; THE QUOTED AND ACTUAL SELLING PRICE.

4548. It should be noted that the above examples apply to articles taxable at 5 per cent. The same general principles apply where other rates obtain, though the fractions are used in example (2) would vary.

4549. Example (3). A, the manufacturer, quotes a selling price or contracts to sell goods at $105, including tax, and bills the goods to B as:

"Article No. 1, selling price, including tax, $105."

The tax is computed on $105, the quoted and invoiced selling price.

4550. Example (4). A manufacturer sells an automobile to B, including insurance, gas, and oil, and bills it as:

"One car, $2,150."

The tax is based on the full amount of $2,150.

4551. Example (5). If, in example (4) the invoice separates the charges into items as, "chassis $1,500, body $500, gas and oil $20, insurance, $30, tax $100," the tax is based on $2,000, the selling price of the chassis and body as specified.

4552. The underlying principle involved in examples (1) and (2) is that the price constitutes the basis for computing the tax and must be specified. *As the price itself forms the basis for computing the tax, it is just as important that this item be mentioned as that the tax be specified.* A manufacturer does not properly compute a 5

per cent tax on a sale at a *price* of $105, by taking 1/21 of that sum, even though he might say that the price was $105 and that 1/21 was tax. If $105 is designated as the price of an article, even though it be stated that such price includes the tax, the tax nevertheless applies to such entire price, and the fact that some part of it may be used to pay taxes affords no ground for concluding that the remaining portion, that is, the net proceeds of the sale after tax is paid, should form the basis for computing taxes. In case the manufacturer sells tires subject to a 2½ per cent tax, and desires to collect the tax in addition to the price, charging $40 as the price of the tires and $1 as tax, the terms of sale should show specifically that $40 is the price and $1 is tax, or he can indicate that $41 will be a charge made up of two items, 40/41 of the charge being the price and 1/41 being the tax; price lists; billings, invoices, etc., being made out accordingly. *In other words, both price and tax must be designated and specified.*

ART. 34. 4687. *Contract of sale before January 1, 1924, of Article Taxable under Section 900, 1921 Act, at Rate greater than Tax on same Article under Section 600, 1924 Act.* If before January 1, 1924, "A", a manufacturer of parts or accessories taxable at 5% under Section 900 of the Revenue Act of 1921, made a contract with "B", for the sale, after the tax takes effect, of an article taxed under Section 900 at a higher rate than that imposed by Section 600, and which included in the price stipulated in the contract the tax under Section 900 of the 1921 Act, and the contract does not permit the deduction from the amount to be paid of the difference between the tax at 5% under Section 900 of the 1921 Act and the tax at 2½% under Section 600 of the 1924 Act, "A" must refund to "B" so much of the amount of such difference as is not permitted to be deducted from the contract price. (See Arts. 30 and 36 as to credits for such refunds.)

APPENDIX B.

"My Dear Mr. Chairman: The revenue acts of 1918, 1921, and 1924 imposed an excise tax upon the sale by the manufacturers of certain automobile parts and accessories.

Under the regulations of the Treasury Department, a manufacturer was authorized to reimburse himself in the amount of tax paid by quoting the selling price and the tax in separate amounts and collecting the tax from the purchaser.

There have been several court decisions to the effect that certain articles, upon the sale of which a tax had been paid, were not automobile parts or accessories, that the law did not impose a tax upon their sale, and that the amounts paid as tax should be refunded.

If these decisions become final, refunds will be payable to the manufacturers who availed themselves of the privileges granted by the regulations and who collected the amounts from the purchasers. Many reputable automobile manufacturers have informed me that they do not intend to file claims for refund of amounts which they collected from the purchasers except in cases where they can pass the refund back to the purchasers, for obviously they would otherwise be unjustly enriched. • • •

It is my opinion that no refund should be made in these cases unless the manufacturer has filed, prior to the making of the refund, a statement under oath setting forth the names of the purchasers from whom he collected, and unless the manufacturer has agreed in writing with the Commissioner of Internal Revenue to distribute the refund to the purchasers. The Chairman of the Committee on Ways and Means and the Chairman of the Committee on Finance have informally approved this policy.

Accordingly, I am transmitting herewith a draft of a proposed provision to be added to the paragraph of the deficiency appropriation for refunding internal revenue taxes illegally collected, made pursuant to the estimate therefor transmitted by the President to the Speaker of the House of Representatives under date of December 10, 1926, and referred to your committee.

Very truly yours."

Articles by Geo. M. Wilmeth in 5 Nat. Income Tax Magazine, page 323 (Sept. 1927)—"The Limitations on the Refund of Excise Taxes."

APPENDIX C.

SECTION 424 OF THE REVENUE ACT OF 1928.

"SEC. 424. Refund of automobile accessories tax.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer or importer in respect of the tax imposed by subdivision (3) of § 600 of the Revenue Act of 1924, or subdivision (3) of § 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY,
a Corporation,
Petitioner,

v.

HARWELL G. DAVIS, Collector of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The undersigned respectfully petitions this Court for leave to file the subjoined brief as a friend of the Court.

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BRIEF AMICUS CURIAE

SUBJECT MATTER OF BRIEF

It is not intended that this brief be complete in itself or considered apart from that submitted by the petitioner. It will be confined to a limited phase of the question before the Court.

The restrictions upon the return of the money unconstitutionally taken from processors under the Agricultural Adjustment Act were justified before Congress upon the ground that the return of the money would permit the processors to be enriched at the expense of others; a doctrine

which has been termed "unjust enrichment".[1] In the lower courts the same theory or doctrine has been advanced.

It will be the purpose of this brief to show (1) that the law does not operate upon the basis of any such principle; that it does not prohibit the return of the taxpayer's property only in those cases where such a return would result in the enrichment of the taxpayer to an extent greater than would have been the case had there been no tax; it will further be shown (2) that if the law could be construed as based upon such a doctrine, it is impossible to determine or apply that doctrine in this type of case, and further to show (3) that the provisions of the statute are so indefinite in prescribing the formula to be followed that it is either unconstitutional for indefiniteness or is so arbitrary and capricious as to amount to the taking of property without due process of law.

I.

The Statutory Restrictions of Section 902 Are Not Based Upon Any Principle Which Permits the Return of Property Unconstitutionally Taken Except in Cases Where Such Return Would Enrich the Taxpayer Unjustly.

In other briefs filed in this Court it has been pointed out that taxpayers will not be "unjustly enriched" by the return to them of property which was unconstitutionally taken from them. With this principle we are thoroughly in accord. We believe, however, that there is a further situation arising out of the statute which should be called to the attention of the Court.

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[1] Senate Report No. 2156, 74th Congress, 2nd Session, on H. R. 12395, pp. 32, 33.

Compare Title III of the Revenue Act of 1936 entitled "Tax on Unjust Enrichment".

Assuming, for the purpose of argument only, that one whose property has been taken contrary to law is not entitled to its return if the result would be to place him in a better condition than would have been the case had his property never been taken (that such recovery would constitute "unjust enrichment"), the restrictions imposed by the Revenue Act are not based upon any such doctrine.

Section 902 of the Revenue Act of 1936 provides that the taxpayers shall not be entitled to the return of their property or its equivalent,

> "unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, • • • in the price of any article with respect to which a tax was imposed under the provisions of such Act, • • • (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; • • •"

It is submitted that the statutory test bears little real relation to the question whether the return of the amount exacted from the processor would result in enriching him beyond the position in which he would have been had the tax never been exacted. Nevertheless the statute asserts that if the processor has increased the selling price of his goods by the amount of the tax, the recovery of the tax is not justifiable.

The statute overlooks entirely the damage and loss caused to taxpayers by the imposition of the tax. To illustrate: Assume that if no tax had been imposed, Processor A would have sold in a given year 10,000 articles at a selling price of $1.00 an article with a net profit of 25c per article. However, a tax was imposed on the raw materials which went into those articles equal to 5c per article and all other factors remained constant.[2] Processor A increases the selling price to $1.05 an article to which the public reacts unfavorably and buys only 8,000 such articles. The tax is declared unconstitutional and Processor A seeks to recover the $400 of taxes paid by him. This amount, added to his profit of 25c an article on 8,000 articles, would give him a total return of $2,400. His profit, if the tax had not been imposed, would have been $2,500. It is obvious that the recovery of the tax will not unjustly enrich A; that the necessary increase in the selling price has resulted in greater damage than the amount of the tax. That such a situation would result was brought out at the Congressional hearings, but the statute was not revised to remedy the situation.

The following is quoted from the record:[3]

> "SENATOR HASTINGS. Mr. Secretary, if the processor did only half as much business as he did in former years, after the tax was put on, and the margin of profit was the same, he might very well be making very much less for his concern, might he not?
>
> "MR. WALLACE. I think that would be an axiom, if he did only half as much business and had a small volume, he would be making less than half as much.

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[2] Such a stability of other factors never really exists. In the example given, overhead costs would have to be distributed over 8,000 instead of 10,000 articles, necessarily reducing the net profit per article below 25c.

[3] Hearings before the Committee on Finance, United States Senate, 74th Congress, 2nd Session, on H. R. 12395, pp. 862-863.

"SENATOR HASTINGS. Then if your rules of determining the facts are based solely upon the difference in the margin, is that a correct rule in order to determine whether or not the processor is entitled to a return of his tax?

"MR. WALLACE. I do not think the Government would be responsible for the volume of the business done.

"SENATOR BAILEY. *The Government would not be responsible for the volume, but the increased taxes and the prices reduced the volume, and I think that should be a factor that should be taken into account.*

"MR. WALLACE. *I think you should take it into account.*

"SENATOR HASTINGS. *Is your amendment drawn so that it can be taken into account?*

"MR. WALLACE. *I do not think the amendments are drawn to take that particular point into account.*

"SENATOR KING. In determining the marginal differences which you have indicated on these charts, have you taken into account the factor, for instance, of imports, increased exports, or the change in the prices of foreign goods?

"MR. WALLACE. I do not see where that would enter into it. That has not been taken into account, Senator." (Italics supplied).

That the statute is not premised upon any principle of so-called "unjust enrichment" is further demonstrated by an examination of Section 907(e)(2). This section emphasizes the fact that the objective of the statute is to base the right of recovery on comparative selling prices and purchasing prices rather than upon any consideration of whether or not the recovery of the illegal tax would place the processor in better condition than would have been the case had no tax been imposed. The section provides that the Commissioner of Internal Revenue may rebut a prima facie case in favor of the taxpayer by showing:

> "• • • that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; • • •"

The principles which we have pointed out are not new. While economists differ in their terminology, they are in accord that there is a vast difference between (1) shifting the tax through raising selling prices or lowering purchasing prices, and (2) the economic effects of a tax on a taxpayer's business. The former is generally called "shifting the burden of a tax", while the latter is frequently called the "incidence", "pressure", "repercussion", or "economic effect" of a tax.[4]

It is therefore submitted that, assuming for the purposes of argument only that the doctrine of unjust enrichment might be a defense to the recovery of this tax, nevertheless Section 902 of the Revenue Act of 1936 is not a statutory declaration of this rule. Section 902 prevents recovery of the money unconstitutionally taken from the petitioner even though such recovery would still leave it poorer than it

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[4] See: Seligman, E. R. A., *The Shifting and Incidence of Taxation*, Fifth Edition (Revised), New York, 1926, pp. 1 and 11; Bastable, C. F., *Public Finance*, Third Edition, London, 1903, pp. 360-361; Hodson, H. V., *Economics of a Changing World*, New York, 1933, pp. 222-224; Fetter, Frank A., *Modern Economic Principles*, Vol. II, New York, 1922; Denslow, Van Buren, *Principles of the Economic Philosophy of Science, Government and Industry*, New York, 1888.

would have been if the tax had never been imposed. The statute patently bears no relationship to any equitable doctrine of unjust enrichment and is therefore arbitrary, capricious and deprives the petitioner of its property without due process of law.

II.

Even If Section 902 Is Based Upon the Doctrine of Unjust Enrichment It Is Impossible to Apply That Doctrine in This Type of Case.

Assuming, but not admitting, that Section 902 is directed to the "pressure" or final "incidence" of the tax rather than its "shift" the processors are confronted with the impossibility of meeting the test of the statute. The petitioner has ably argued (brief, p. 34 to p. 40) the impossibility of proving whether or not a tax has been shifted by raising or lowering prices over what they would have been if the tax had never been imposed. It would seem patent that it is equally impossible to determine the "pressure" or final "incidence" of a tax. No other subject in the field of economics has given rise to such debate as the question of the shifting and economic effect or "incidence" of taxes—and still no definite conclusions have been reached. It has been said:[5]

> "As introductory to an analysis of the way in which taxes work, it is necessary to consider the shifting and incidence of taxes. There is perhaps no question respecting which so many conflicting views are entertained. Professor Seligman, whose ability to review bibliography and classify literature is unexcelled, shows in his chapter upon 'The History of the Doctrine of In-

[5] Adams, Henry Carter, *The Science of Finance*, New York, 1898, p. 388.

> cidence' that there are ten distinct groups of opinion entertained by writers upon this subject, and this of itself is adequate to suggest the care with which the student should enter upon its consideration."

As to all of these schools of thought, Professor Seligman says:[6]

> "Much—nay, by far the greater part—of the doctrine has come down to us in a systematic development from the original theories of the founders; but here and there excrescences are to be lopped off, gaps are to be filled."

With almost a dozen divergent theories confronting us, all of which require "loppings" and "fillings", the fundamental truth of Mr. Justice Holmes' statement in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, becomes obvious:

> "Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result."

The writings of economists demonstrate the following fundamental proposition:

The subject of the "incidence" or "pressure" of a tax is a theoretical rather than a practical science; that economists only attempt to state tendencies as to the shifting of a tax and its "incidence" or "pressure" and as to such tendencies there is a vast divergence of opinion; and that the "incidence" or "pressure" of a tax cannot be made the subject of a mathematical computation as required by Section 902 of the statute.

Professor Seligman says:[7]

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[6] *The Shifting and Incidence of Taxation* (5th Edition), p. 216.
[7] Ibid pp. 212-213.

"To the reader who understands the higher mathematics the hypothetical principles of the influence of tax on price can be illustrated with a degree of refined precision that is eminently satisfactory. But this advantage is occasionally secured at a heavy cost. While the intricate algebraic formulae may be worked out with perfect exactitude, the slightest flaw in a single symbol may invalidate the whole conclusion. Furthermore, the mathematical study of the pure theory often assumes a simplicity of condition which does not actually exist; it purposely neglects the all-important element of friction, and constructs hypotheses irrespective of their agreement with the facts of actual life. If, as sometimes happens, these hypothetical results are applied to the conditions of the market-place, the results are likely to be unreal."

It necessarily results that Section 902 of the Revenue Act of 1936 denies the taxpayer any remedy, for it is impossible to comply with its requirements. The statute is therefore arbitrary, capricious and unconstitutional.

III.

Section 907 Is Either So Indefinite in Establishing a Formula That It Must Be Declared Unconstitutional or Is So Arbitrary and Capricious as to Amount to a Taking of Property Without Due Process of Law.

If Section 902 establishes conditions precedent to the right to obtain a refund that are fundamentally defective, it would appear that any formula such as that provided by Section 907 would necessarily be tainted with the same fatal defects. These defects have been detailed in petitioner's brief, p. 40 to p. 51, wherein it is stated that Title VII

1. Creates an arbitrary and unreasonable presumption.

2. Unreasonably transfers the burden of proof to the processor.

It is submitted that fundamentally there is no difference in the degrees of unconstitutionality of Sections 902 and 907. It should be noted, therefore, that if Section 907 is declared unconstitutional, the Government should not be permitted to fall back on Section 902 and maintain that it is separable from Section 907. The inseparability of these provisions is further demonstrated by the legislative history of the adoption of Title VII of the Revenue Act of 1936. The Senate Finance Committee in its Report [8] points out that Section 902 is similar in principle to Section 21(d) of the Agricultural Adjustment Act, and goes on to say:

> "The imperative need of revising these provisions is apparent from a consideration of the administrative burden which confronts the Bureau of Internal Revenue, if claims for refund under the provisions of the Agricultural Adjustment Act must be passed on under Section 21(d) in its present form."

The Committee then goes on to state that Section 907 takes care of these as well as other difficulties. It is patent, therefore, that Congress never intended Section 902 to stand alone, and that if Section 907 is arbitrary, capricious and unconstitutional, the whole of Title VII must fall.

The petitioner in its brief has emphasized the fundamental defects involved in attempting to determine the incidence of a tax by comparing "spreads" in cost of raw materials and selling price of finished products between the period during which the tax is imposed and a period before and after the tax period. This fallacy has been emphasized, not only by economists generally, but has long been admitted by economists in the Department of Agriculture.

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[8] Report No. 2156, 74th Congress, 2nd Session, pp. 32-34.

The most specific statement on the subject is in a report by the Agricultural Adjustment Administration, which stated:[9]

> "The question 'who pays the processing tax' cannot be answered by a mere examination of the change in producer, wholesale and retail prices and the final spread between them. It is true that commonly this question is answered in this partial way without taking into account such facts as the volume of supplies, the rate of consumption, the amounts paid by consumers, the total returns to producers, the benefit payments made to producers from the proceeds of the processing tax, the stimulus to general business activity through increased farm purchasing power, and the improvement in the credit structure of the country through enhancement of agricultural values."

The purpose of this amicus brief, however, is to emphasize the practical rather than the theoretical arbitrary nature of Section 907. That section is either so indefinite in establishing a formula that it must be declared unconstitutional,[10] or is so arbitrary and capricious as to amount to a taking of property without due process of law.

The fundamental basis of Section 907 is a comparison of cost price and sales value, and since these terms are defined by the statute, it is imperative to turn to those definitions. Section 907(b) (5) defines cost as follows:

> "The cost of commodity processed during *each month* shall be (a) the *actual cost* of the commodity processed *if the accounting procedure of the claimant is based thereon,* or (b) the product computed by multiplying the quantity of the commodity processed by the *current prices at the time of processing* for com-

[9] "A Report on the Administration of the Agricultural Adjustment Act, May 1933 to February 1934."

[10] See cases cited in petitioner's brief, p. 33.

modities of like quality and grade in the markets where the claimant customarily makes his purchases." (Italics supplied.)

It should be noted that the first determinative element is that the formula is based on monthly figures. Beyond that point, however, it is submitted that the formula for determining "cost" is unintelligible. It provides that the taxpayer should use *actual* cost figures if its accounting procedure is based on cost. Accounting procedure as set forth in the Revenue Act of 1936 and Regulations 96 issued pursuant thereto, involves such questions as accrual versus cash receipts and disbursements method of accounting; calendar year versus fiscal year method of accounting; long term contract versus completed contract basis of accounting, etc. The only place cost enters into a method of accounting is in the valuation of inventories, with respect to which the Income Tax sections of the Revenue Act provide that either "cost" or "cost or market whichever is lower" should be used. Patently, however, Section 907(b) (5) is not, or at least should not be concerned with the method of keeping inventories as a basis for determining shift in processing taxes.[11]

It is accordingly submitted that Section 907 is inherently defective in that the formula provided therein is so vague and uncertain that it is impossible for this Court to give it any definite meaning without invading the field of legislation.

But if we assume that the statute means that the cost figure is to be determined on the "a" or "b" basis dependent on whether the taxpayer reports its inventories on an "actual cost" basis as contrasted to an average cost, market, or some other basis, it is then submitted that the

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[11] A tax cannot be shifted until the article is sold. See post p. 16 and discussion on the definition of selling value.

statute is clearly arbitrary and capricious. In the first place, there certainly can be no logical reason why shift in tax should be measured on the one hand by "actual cost," and on the other hand under Section 907(b) (5) (b), by a so-called "replacement cost". The arbitrary nature of such a provision can easily be demonstrated by the use of the Department of Agriculture's own figures.

Some processors of cotton tag each bale purchased and keep their production records in such shape that they know when any particular bale of cotton is processed. Other processors merely inventory their cotton on an average rather than an "actual" cost basis. The first processor, whom we will call A, bought a large supply of cotton in June of 1932, when the average spot price per pound of "7/8 middling" at ten combined markets was 4.99c per pound.[12] The second processor, whom we will call B, also bought a large supply of the same cotton at the same price. A, however, carefully tagged his bales, and so when he used that cotton along with other cotton purchases in October of 1933, he knew the "actual" cost to be 4.99c per pound. B, on the other hand, merely averaged the price of his cotton purchases, and although he used the cotton purchased in June of 1932 in October, 1933, his records merely showed the average cost of all his cotton purchases. Consequently, since B's records do not show "actual" cost of the cotton used in October, 1933, he is entitled to determine his cost by "multiplying the quantity of the commodity processed by the *current* prices at the time of processing." The average spot price of "7/8 middling" in October, 1933, at ten combined markets was 9.16c.

Thus A because he has kept more detailed records than B uses a cost figure of 4.99c per pound, whereas B uses a

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[12] Agricultural Statistics, United States Department of Agriculture, 1936, p. 83, Table 108.

PRE TAX PERIOD (1932)

2.	3.	4.	5.	6.	7.	8.
ost per lb.	*Selling Price per lb.*	*Margin*	*Cost Basis Used*	*Average Cost per lb.*	*Tax per lb.*	*Comb Co*
8.3c	30c	21.7c	Actual Cost of 1931-1933 Fire-Cured Type 21	6.6c	2.14c	8.7
8.2c	30c	21.8c	Reproduction Cost of 1933-1935 Fire-Cured Type 21	9.43c	2.14c	11.5

cost figure of 9.16c per pound, or a difference in cost basis of 4.17c per pound. Since the processing tax on a pound of cotton was 4.2c per pound, it is obvious that, disregarding all other factors, B can show a lower spread between cost and selling value by almost the amount of the processing tax.

The arbitrary character of the statute is even more strikingly illustrated in the case of tobacco. In the case of snuff the tobacco is stored for a period of upwards of two years before it is used. A tags his hogsheads of tobacco, and must therefore use "actual" cost. B, on the other hand, merely averages his costs and therefore must use "reproduction" cost. Both A and B sell the same type of product—say a 10c package of snuff. They both buy their tobacco at the same auction sales in open competition with one another. The processing tax on snuff tobacco is 2.14c per pound, and it will be assumed that a pound of tobacco, farm weight, is required to make three packages of snuff.[13]

With these assumed facts before us, and using the statistics of the Agriculture Department,[14] let us apply the statutory formula prescribed by Section 907:[15]

TAX PERIOD 1933-1935

4.	5.	6.	7.	8.	9.	10.	11.	12.
Margin	*Cost Basis Used*	*Average Cost per lb.*	*Tax per lb.*	*Combined Cost*	*Selling Price per lb.*	*Margin*	*Difference in Margin Column 4-10*	*Tax Absorbed per Pound, i.e., Amount of Refund*
21.7c	Actual Cost of 1931-1933 Fire-Cured Type 21	6.6c	2.14c	8.74c	30c	21.26c	0.44c	0.44c
21.8c	Reproduction Cost of 1933-1935 Fire-Cured Type 21	9.43c	2.14c	11.57c	30c	18.43c	3.37c	2.14c

[13] Fire-cured tobacco is the principal tobacco used in the manufacture of snuff. American Tobacco Types, Uses and Markets, Charles E. Gage, Bureau of Agricultural Economics, Department of Agriculture Circular No. 249, Aug. 1933, p. 12.

[14] Agricultural Statistics, United States Department of Agriculture, 1936, p. 108, Table 147.

[15] The figures for the post-tax period (Sec. 907(c)) are not published as yet and are not used in the illustrative case.

Thus, if the formula prescribed by Section 907 is of sufficient clarity to be possible of application, it is apparent that processor B receives a refund almost 500% larger than A receives. This results not because they buy their tobacco at different prices or sell their products at different prices or any other differences in cost, merchandising overhead, taxes, etc., but merely because A kept more detailed accounting records than B so that A could ascertain his actual monthly cost of tobacco used whereas B had only an average cost figure of all tobacco contained in his warehouses.

It is submitted that the above practical application of the statute is sufficient to justify a decision of its unconstitutionality on the ground that it arbitrarily and capriciously deprives a taxpayer of his property without due process of law.

The "cost" is only one element in determining the "shift" of the tax. The Court's attention is directed to the statutory definition of "Gross sales value of articles". Section 907(b)(6) defines this provision as follows:

> "The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality." [16]

The above definition of sales value discloses that the presumption established by the statute has no reasonable rela-

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[16] It must be remembered that we are dealing with a statute that establishes a presumption as to whether or not the taxes imposed by the Agricultural Adjustment Act were shifted or absorbed by the taxpayer. It is therefore essential that the ultimate fact presumed must bear a reasonable relationship to the facts upon which it is based. (See brief of petitioner, p. 40 to p. 48.) It is not sufficient that the parties are entitled to rebut the presumption.

tionship to the facts on which it is based. We take it that it is elementary that a tax cannot be shifted unless and until the article on which the tax is placed is sold. Section 907(b)(6), however, does not deal with actual sales but with hypothetical sales value. In other words, in working out the presumption, the sales figure is based upon the fiction of what the article *would have sold for* if it had been sold during the month in which it was processed. The statute totally disregards actual facts and proceeds on the basis of fictional values, which in many, if not most, instances, are contrary to actual facts. It is submitted that this Court should take judicial notice of the fact that in this day and age of large scale production and distribution, most manufacturers have inventories of finished goods on hand from which they can make their sales for months in advance. Certainly, this Court should recognize that many businesses are seasonal in nature, e.g., the blanket industry, and a processor may spend months building up an inventory which he can sell during a short selling period. To say that for the purposes of determining shift in tax the sales figure should be based upon price for a certain month, when the actual sales figure may be dependent upon prices occurring many months later, taxes human credulity beyond all bounds of reason. Thus, for example, bacon and hams are cured from 30 to 90 days. A hog might have been processed in September, 1934, when the retail price of smoked picnics (ham) was 16c per pound. Assume a 60 day cure, and further assume that the picnic was sold immediately after the curing was finished, the actual sale price would have been 14c per pound.[17] The statutory presumption would be determined upon a sales figure of 16c, whereas the actual sales price was 14c, or an initial discrepancy of 2c a pound. Con-

[17] Livestock, Meats and Wool—Market Statistics and Related Data, 1935. United States Department of Agriculture, June, 1936, p. 132.

sidering the fact that the processing tax per pound imposed on the picnic was only 1.82c per pound,[18] it is patent that the statutory presumption bears no reasonable relationship to the actual facts and should be declared unconstitutional.

CONCLUSION

In support of the arguments made in this brief, an appendix containing extracts from the writings of numerous economists has been attached. The Court's attention is respectfully directed to the following classification of the appendix.

A. *The "Pressure," "Incidence" or "Economic Effects" of Taxes.*

The economists agree that the "pressure" or "incidence" of a tax has real economic effects on a taxpayer and, even assuming he is able to shift the burden of the tax, may leave him poorer than he would have been if the tax had never been imposed.

B. *Impossibility of determining "Pressure," "Incidence" or "Economic Effects" of Taxes.*

The economists agree that the determination of the "pressure" or "incidence" of a tax is an impossible task because so many related factors must be taken into consideration and that the comparison of cost price to sales value as between two different periods of time cannot serve as a reasonable basis for deter-

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[18] T. D. 4518, and regulations issued pursuant thereto. Reported at 1935 CCH ¶ 1983-A-12.

mining the "pressure" or "incidence" of a tax or even the shift of the burden of the tax.

Respectfully submitted,

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APPENDIX A

The "Pressure," "Incidence" or "Economic Effects" of Taxes

1. Hayes, **Our Economic System**, Vol. II, pages 318-319.

"As was emphasized in the discussion of the prices of goods produced by concerns that have large fixed plants, **the imposition of a tax upon units of output will normally be borne by the owners of the industries in question.** Such concerns should increase the price of their products only by reducing the supply of them. But to reduce the supply would mean that the average cost of production would be increased, since the total overhead would be spent on a fewer number of units than had formerly been the case. Hence, under such conditions, a business concern might find that its net loss would be less by bearing the tax, than by shifting it to the consumers of the product."

2. Ely, **Outlines of Economics**, page 793.

"The word 'shifting' usually refers to the increase of price by which the original payer of the tax attempts to recoup himself. This increase of price is usually accompanied by collateral economic disturbances or dislocations—suggested by the phrase 'repercussion of taxes' which is frequently employed in this connection—that are quite as important as the mere change in price. For instance, an excise tax (per unit of product) upon a monopoly may raise the price by as much or even more than the tax itself. But the monopolist nevertheless feels the burden of the tax in reduced profits. **When we say that a tax is shifted, then, we do not imply that the original payer evades *all* the evil effects of the tax.**"

3. Hobson, **The Industrial System**, page 229.

"From this reasoning, if it be correct, there issue two conclusions. First, that a tax imposed in the first in-

stance upon an income which is a subsistence wage, or any minimum cost of production, tends to be moved on until it finds, in the course of its shifting, elements of 'surplus income' on which to settle. Second, that **no consumer, as consumer, can be considered to have any ability to bear a tax; taxes must ultimately be held to be paid out of such incomes as can bear them.**

"In any scientific analysis of incidence of taxes, we must trace the incidence to incomes derived from ownership of some factor of production, that is to say, **all taxes are ultimately borne by certain classes of producers.**"

4. Hodson, **Economics of a Changing World**, pages 222-224.

"In the short run, the ability of producers to lower their prices to the level of prime costs, that is to say until their fixed capital becomes not merely unremunerative compared with the return obtainable on investment elsewhere, but actually worthless, may mean that competition will force down the net price to a point at which volume of sales and the gross price to the buyer are approximately the same as before, but in the long run, as unremunerative capital gets squeezed out, a higher price and a lower volume of sales are to be expected. **In either case, the seller pays the greater part of the tax.**"

5. Atkins, **Our Economic World**, pages 371-372.

"**Moreover, a tax intended to assess householders** (owners of furniture, radios, refrigerators and automobiles) **may actually strike at the profits of the manufacturing companies.**"

6. Knight, **Economics**, Vol. II, pages 919-920.

"In a sense it is misleading to speak of the 'ultimate incidence' of taxes for, because of the interrelations already indicated between taxation on the one

hand and production, consumption, and distribution on the other, **all taxes must, in last analysis, bear most heavily upon those who own, at the time the full effects of the tax are felt, the relatively fixed agencies of production.**"

7. Carver, **Principles of National Economy**, page 630.

"The buyer of what one has to sell and the seller of what one has to buy will have something to say about it. Unless the tax affects the general conditions of the market in a way which favors the payer of it, he will not be able to sell at a higher or buy at a lower price—in other words, **he will not be able to shift the tax.**"

8. Mill, **Principles of Political Economy**, Vol. II, page 343.

"**Taxes on necessaries must thus have one of two effects. Either they lower the condition of the laboring classes; or they exact from the owners of capital, in addition to the amount due to the state on their own necessaries, the amount due on those consumed by the laborers.** In the last case, the tax on necessaries, like a tax on wages, is equivalent to a peculiar tax on profits; which is, like all other partial taxation, unjust, and is especially prejudicial to the increase of the national wealth."

APPENDIX B

Impossibility of Determining "Pressure," "Incidence" or "Economic Effects" of Taxes

1. Senate Document No. 126, page 24.

"**It is impossible to disentangle the effect of any individual element of cost upon selling price.**"

2. Department of Agriculture, **The Processing Tax**, page 8.

"**As a practical matter, it is impossible completely to separate the effects of the processing taxes from the**

effects of the adjustment programs on prices farmers receive or consumers pay for agricultural products. Nor is it possible completely to separate the effects of the adjustment programs from the effects of the drought, the devaluation of the dollar, expenditures for relief, and general business recovery on prices of agricultural products."

3. National Tax Association, **Proceedings of 22d National Conference, 1929.** From an article entitled "Consumption Excise Taxes as Relief for the Tax Burden on Farm Property", by S. M. Derrick, page 271.

"But as a matter of fact it is by no means certain that property and business taxes are shifted to the ultimate consumers. **The whole matter of the shifting and incidence of taxation is in a controversial stage.**"

4. Wells, **The Theory and Practice of Taxation,** page 569.

"No attempt ought to be made to construct or formulate an economically correct, equitable, and efficient system of taxation which does not give full consideration to the method or extent to which taxes diffuse themselves after their first incidence. On this subject, there is a great difference of opinion, which has occasioned, for more than a century, a vast and never ending discussion on the part of economic writers. **All of this discussion, however, has resulted in no generally accepted practical conclusions**; has been truthfully characterized by a leading French Economist (M. Parieu) as marked in no small part by the 'simplicity of ignorance', **and from a somewhat complete review (recently published) of the conflicting theories advanced by participants one rises with a feeling of weariness and disgust.**"

5. Knight, **Economics,** Vol. II, pages 919-920.

"Since, however, the current operation of every tax is affected by the past effects of this and of all other taxes as well as by the simultaneous operation of what-

ever other taxes co-exist in the revenue system, **it is an exceedingly complex matter to uncover the exact** *final resting place* **of any particular tax.**"

6. Fetter, **Modern Economic Problems**, Vol. II, pages 283-284.

"The lawmaker cannot tell exactly where the weight will fall. **The principles of value give some guidance in the inquiry, but the workings of the principle are difficult to follow.**"

7. Denslow, **Principles of the Economic Philosophy of Science, Government and Industry**, pages 462, 465, 467.

"It has never occurred to the writers on this subject, that if the ultimate incidence, or final deleterious effect, of a tax or burden can be defined, much more by parity of reason ought we to be able to define where the benefits of production, or of a new aid to production, stop. We ought to be able to point out the extreme outward person upon whom the beneficent effects of the invention of printing, the discovery of America, or of gold in California, rests. A tax, considered as a diminution of production, can hardly be measured until we can assign limits to the effects of aids to production. For peradventure, the tax itself may be an aid to production, and in that case it has no incidence, properly speaking, since its supposed 'blow' is converted into a caress.

* * * * * * *

"**There are those who feel confident to decide, amidst this congeries of mazy influences, radiating outward indefinitely through all the transactions of mankind, what the ultimate incidence of a tax may be. To me it seems as hopeless as to attempt to set bounds to the causative operations of a winter's snow or a summer's rain.**

* * * * * * *

"**The notion, that the incidence of taxes should be made certain, is like the kindred notion, that the law**

should be made simple. It demands an impossibility in finance.''

8. Carver, **Principles of National Economy**, page 630.

''One of the first lessons that the student of taxation learns is that the payer of a tax sometimes shifts the burden in whole or in part on to someone else, thus relieving himself, in part at least, of the burden. This can come about only in the process of buying and selling. **The person taxed, in other words, has no means of persuading anyone else, as a favor to himself, to assume the burden**; he can only charge a higher price for what he has to sell, or pay a lower price for what he buys, thus recouping himself for what he has paid in the form of a tax. **But this matter of raising the price of what one has to sell or depressing the price of what one has to buy is something which is not so easily done as said, as anyone can convince himself by trying it.''**

9. Taussig, **Principles of Economics**, pages 557-558.

''The very statement of this last case points to an important limitation on the pertinence of all such analysis. There is danger of making an intellectual plaything out of intricate reasoning on the play of demand, varying costs, taxes and the like. **Some economists have given no small share of attention to problems of this kind, forgetting that their reasoning is purely hypothetical and that there is little that corresponds to it in the concrete facts of life. All economic principles hold good only in the rough. Semi-mathematical reasoning, even pure mathematical reasoning,** not infrequently aids in bringing out with clearness the underlying principles; but it **can rarely be pushed with advantage into details.** It cannot be so pushed with reference to the incidence of taxes—neither as regards the modification of incidence due to increasing or diminishing returns, nor as regards the effect of taxes on monopolized articles.''

10. Atkins, **Our Economic World**, pages 371-372.

"It would be hard to determine, again, whether or not commodity taxes can be shifted wholly from the producer to the consumer. In a period of rising prices and quick sales (a 'seller's market'), the business enterprise may find it easy to pass along commodity taxes by charging higher prices. In a period of falling prices and slow sales (a 'buyer's market'), the business enterprise may be compelled to bear the costs of commodity taxes, finding itself unable to push up the price to discount the tax in full."

11. Harvard University, **Business Economics I.**, From the article by Richard S. Meriam, "Some Notes on Cotton Prices and the Processing Tax," Appendix B, page 15, February, 1936.

"The prices of some commodities, of which cotton is one, are affected by speculation, by speculative anticipation of eventual results. This factor cannot be ignored in forming an opinion of the incidence of the cotton processing tax."

12. Means, **The Methods of Taxation**, pages 237-238.

"It follows also that the intent of the legislature that particular persons shall pay the tax imposed by a general law constitutes no presumption that such persons will really carry the burden of the tax. That this is true in many cases, and to a great extent, is disputed by nobody; **but in what cases, and to what extent, even if discoverable by experts, is not generally understood."**

13. National Tax Association, **Proceedings of 22d National Conference, 1929**, page 271.

"A tax on business may or may not be shifted; depending upon the matter of monopoly, the conditions of the cost of production, the nature of the business, and other factors of varying importance. **Certainly, no definite conclusion can be reached that this position is valid."**

14. Wells, **The Theory and Practice of Taxation**, pages 570-571.

"It is essential at the outset to correct reasoning that the distinction between *taxation* and *spoliation* be kept clearly in view. That only is entitled to be called a tax law which levied uniformly upon all the subjects of taxation; which does not of itself exempt any part of the property of *the same* class which is selected to bear the primary burden of taxation, or by its imperfections to any extent permits such exemptions. **All levies or assessments made by the State on the persons, property, or business of its citizens that do not conform to such conditions are spoliations, concerning which nothing but irregularity can be predicated**; nothing positive concerning their diffusion can be asserted; and the most complete collection of experiences in respect to them cannot be properly dignified as 'a science'."

15. Hobson, **Taxation in the New State**, page 53.

"But enough has been said to indicate the subtly psychological factors which here help to determine the effect of a rise of price upon demand for different classes of commodities. **The incidence of a tax will vary with their subtle pressures**. We can never treat any tax upon commodities as obviously transferable to the 'consumer', even in the process of finding producers surpluses in which to settle. Some of it will generally pass, **but how much no one can predict**. Some of it will be thrown back on the various sets of producers or carriers or vendors."

16. Sidgwick, **The Principles of Political Economy**, page 570.

"**Indeed this process is often so complicated and obscure that it is a problem of considerable intricacy and difficulty to ascertain where the burden of a tax actually rests**; and it is not even a simple matter to state accurately the general principle for determining the incidence of a tax, supposing all the facts to be known."

17. Hunter, **Outlines of Public Finance**, pages 157-158.

"**It would be utterly impossible to trace the burden of every tax until the incidence were definitely determined.** In fact, it would be impossible to trace definitely, through all its ramifications of direct and indirect influences the shifting and effects of any tax burden, though it could be much more nearly done in some cases than in others."

18. Ault, **Principles and Problems of Economics**, page 588.

"**The shifting of some taxes is not so easily traced.** The Physiocrats held that only the extractive industries produced a surplus, *produit net*, and that consequently all taxes finally revert to the owner of natural resources; therefore, they advocated a single tax on land, the *impot unique*. Later it came to be held, particularly among business men and politicians, that any tax after a time became diffused among the citizens of the state so that each finally bore his just and equitable share of the tax burden. This is known as the diffusion theory of tax shifting.

"Were taxes shifted as evenly and universally as the diffusion theorists hold, justice in taxation would be a simple matter. Our legislators would need only to select a good revenue-yielding tax and stick to it. In time, according to the diffusion theory, the burden of taxation would be equitably distributed. But studies of the diffusion theory do not substantiate this claim. It is found that some taxes are shifted in various ways and in varying degrees, while other taxes are not shifted at all."

19. Department of Agriculture, **The Margin Between Farm Prices and Retail Prices on Ten Foods**, pages 10-11.

"There are two principal reasons for long-time changes in the spread between prices at the farm and in the city store. They are, first, changes in costs including wages, transportation rates, material costs and cost of other items, and second, changes in the efficiency

of processing, marketing, and distribution. In addition to changes in those factors there are doubtless changes in the profits of processors and distributors.

• • • • • • •

"The recent growth of chain store distribution, the increasing number of general food stores handling both groceries and meats, the reorganization of city market terminals, and many similar changes have doubtless affected efficiency to some extent.

"Also, there have been significant changes in the processing and packaging of the food products themselves which affect costs. Examples of such changes are the development of small packages, the slicing of meats and bread and the drop in bulk sales of many foods. Some of these changes make accurate comparisons of present prices with pre-war prices very difficult because the consumer is really buying a different food today and in many cases is paying for more processing and packaging."

20. Silverman, **Taxation, Its Incidence and Effects**, pp. 93, 114.

"Conversely, price movements may coincide with variations in the rate of taxation, yet be attributable in part to altogether different factors.

• • • • • • •

"**Similarly, one cannot measure the exact incidence of a tax on imported articles such as motor cars by comparing the prices at dates before and after the imposition of the duty.** All sorts of factors enter into the determination of motor car prices, many of them entirely independent of, and much more important than, changes in the scale of taxation. Following the re-imposition of the 'McKenna duties' the price of some foreign cars increased while those of others declined. Obviously, reasons other than taxation were largely responsible for the price movements. This argument goes to show the imprudence on relying on price statistics for a reliable

guide to incidence. In no other branch of applied economics must figures be used with greater caution.

* * * * * * *

"It was shown, first, that price movements following the imposition or increase of a tax do not necessarily indicate the extent to which it has been shifted."

21. Harvard University, **Business Economics I.** From the article by Richard S. Meriam, "Some Notes on Cotton Prices and the Processing Tax," Appendix B, page 15, February, 1936.

"**It may be said with confidence that the notion that a tax on a commodity always raises the price at once by an amount equal to the tax is not held by any modern economist.**"

22. Carver, **Principles of National Economy,** pages 631-632.

"**There is a more or less general opinion that the value of anything is determined directly by what it costs, and that as a tax adds to the cost it must therefore be added to the price. This overlooks the true relation of cost to value.** The cost of anything affects its value only when it puts a check upon production and limits the supply. Whenever an addition to the cost will cause a decrease in the supply or an increase in the demand, it will raise the value of the article in question. But this will not occur in every case. It is scarcely conceivable that a tax can increase the demand for the thing taxed. If it ever does so, the instances must be so rare that we can safely ignore them. This leaves us to the conclusion that a tax can raise the price of the thing taxed only when it occasions a diminution in the supply."

23. Department of Agriculture, **Price Spreads Between the Farmer and the Consumer,** page 12.

"The relation of margins to supply could be derived theoretically from the relation of margins to price through the supply-price function, after variation in the price level had been eliminated, **but supply-price functions themselves are sometimes vague and unreliable.**"

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Supreme Court of the United States

OCTOBER 1936 TERM.

No. 667.

ANNISTON MANUFACTURING COMPANY, a corporation,

Petitioner,

—against—

HARWELL G. DAVIS, Collector of Internal Revenue,

Respondent.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE IN SUPPORT OF APPEAL.

BENNETT E. SIEGELSTEIN,
As Amicus Curiae.

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Supreme Court of the United States

OCTOBER 1936 TERM.

No. 667.

ANNISTON MANUFACTURING COMPANY, a corporation,
Petitioner,

—against—

HARWELL G. DAVIS, Collector of Internal Revenue,
Respondent.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE IN SUPPORT OF APPEAL.

As *amicus curiae*, the undersigned urges that the judgment of the court below ought to be reversed and contends:

POINT I.

Title VII of the Revenue Act of 1936 is as vague, uncertain and indefinite as its predecessor, Section 21(d) (1) of the Agricultural Adjustment Act of August 24, 1935, in that it attempts to deprive the taxpayer of an adequate remedy at law.

Recognizing the vulnerability of Section 21(d) (1) of the Agricultural Adjustment Act of August 24th, 1935, and the futility of attempting to enforce its provisions after the decision in *Edwin Cigar Co.* v. *Higgins*, 14 Fed. Supp. 817, declaring said section to be unconstitutional, the law-makers created a substitute by enacting Title VII of the Revenue Act of

1936. By this latest enactment, said Section 21(d)(1) was repealed (see Section 901, 1936 Revenue Act). Title VII of said Revenue Act is a similar endeavor to erect a barrier to the recovery (as in Section 21(d)(1) A. A. A.) of * * * "any tax * * * which accrued *before, on or after the date of the adoption of this amendment* * * *." (Italics ours.)

We contend that Title VII of said Revenue Act, relating to the refund of taxes collected under the A. A. A. is as unconstitutional as the provisions of its predecessors, for it likewise—

1. Attempts to place a restraint on the bringing of an action at law to recover taxes illegally assessed and collected;

2. Attempts to summarily withdraw and deprive taxpayers of adequate remedies at law afforded to them by statutes which have been in effect for seventy (70) years past;

3. Attempts to prevent taxpayers from freely applying to the courts for redress;

4. Attempts to force taxpayers to resort to burdensome, technical, indefinite and inadequate proceedings of a prejudicial character in place of a simple action at law;

5. Attempts to force taxpayers to apply for relief to an administrative officer and if aggrieved by his decision to a Board in the same department as the Commissioner, which may act just as summarily, arbitrarily and with as much possible bias as the Commissioner would;

6. Attempts to deprive taxpayers of their inherent right to litigate their claims for refund in the

form of a judicial proceeding *before an impartial judge and disinterested jury;*

7. Attempts to place taxpayers in a position which would leave them shorn of a remedy at law which the Federal Courts have for many years uniformly held to be available to an aggrieved party, under circumstances as are outlined in the complaint;

8. Attempts to manouever taxpayers into a position which can only result in improper determination, inadequate results and the suffering of definite damages without restitution;

9. Attempts to defeat the purposes of well recognized principles of law.

Numerous decisions upholding the argument here advanced, have been written in the lower courts stamping Section 21(d) (1) with disapproval, namely:

United States of America v. *Butler,* 297 U. S. 1;
Rickert Rice Mills Inc. v. *Fontenot,* 297 U. S. 110;
Danahey Packing Co. v. *McGowan,* 12 Fed. Supp. 457;
Gold Medal Foods Inc. v. *Landy,* 12 Fed. Supp. 406;
Baltic Mills Co. v. *Bitgood,* 12 Fed. Supp. 132;
G. B. R. Smith Milling Co. v. *Thomas,* 11 Fed. Supp. 833;
John A. Gebelein Inc. v. *Milbourne,* 12 Fed. Supp. 105;
A. P. W. Paper Co. v. *Riley,* 12 Fed. Supp. 738;

Shenandoah Milling Co. v. *Early* (District Court, Western District of Virginia, decided September 23, 1935, opinion by Paul, *D. J.*);

Wilkes Barre Lace Mfg. Co. v. *Mundy*, 13 Fed. Supp. 870.

In *Danahey Packing Co.* v. *McGowan, supra*, Judge Knight said of Section 21(d) (1) at page 458:

> "* * * *It seems to me that there is grave question whether the restrictions in this amendment do not violate the property rights of these plaintiffs.* At the least, it must be said that any reasonable interpretation of the procedure sought to be laid down by this amendment is so vague and indefinite as to leave uncertain the remedy obtainable." (Italics ours.)

In *Gold Medal Foods Inc.* v. *Landy, supra*, Judges Molyneaux, Nordbye and Joyce in part said of said Section, at page 411:

> "*It is reasonable to believe that Congress in passing Section 21(a) presumed that every taxpayer was afforded an adequate and complete remedy at law.* The history of our tax legislation justified the conclusion that Section 21(a) is bottomed on that assumption. *The taxpayer's right to have the legality of a tax and his right to refund determined in a court of law has always been recognized as inviolate. It is repugnant to one's sense of justice and fairness that a taxpayer should be required to pay a tax, which he in good faith urges is unconstitutional, and then by reason of legislation, be prevented from obtaining a determination as to its constitutionality.*" (Italics ours.)

In *G. B. R. Smith Milling Co.* v. *Thomas, supra,* Judge Atwell in commenting on Section 21(d) (1) said in part at page 835:

> "This amendment seeks to give the taxpayer who may think himself wronged an opportunity to task for a refund of that which he thinks has been illegally exacted, before the Commissioner of Internal Revenue. But it does not stop by merely giving such a remedy in so many wholesome words, but proceeds to define what that hearing shall include, and the result thereof. It may be that the 'road to salvation is narrow' but, likewise, it is well marked and there is no doubt about it; but if this 'remedy' is well marked and beyond doubt, the court has been unable to discover it. *It is clouded in a number of words and phrases, and impediments, and I think, one would be rather bold to call it a plain, adequate, complete remedy.*" (Italics ours.)

Further in said opinion at page 836, Judge Atwell said:

> "As I said, during argument, we do have suits where a transcript of the proceedings before an executive department may be filed in the court which finally hears the controversy and it has certain probative force and weight, but it is never free from attack; nor from being overcome by other evidence, or other witnesses, that may be offered at the trial by the respective litigants. *In other words, we cannot have a trial any way, except the orderly, legal way that is known as the American way in an American court.*" (Italics ours.)

In *Shenandoah Milling Co.* v. *Early, supra,* Judge Paul in a portion of his opinion (apparently not reported) disapproving of Section 21(d) (1) said:

> "*I do not agree with the view that an adequate*

> *remedy exists.* I need not go into the questions of the power given to the Commissioner of Revenue and the deprivation of the right of a jury trial, *but the remedy provided in the amended act is no remedy at all. The conditions imposed are practically impossible to perform and I suppose Congress in a large measure realized that.*" (Italics ours.)

Surely, the right to sue for the recovery of illegal taxes is clearly defined by Section 156 of Title 26 U. S. C. A. (Revised Statutes, Section 3226) and by complying with its provisions, a taxpayer heretofore for many years was clothed with a definite right to sue at law in the District Court on such a cause of action. That privilege may not in our humble opinion be barred by the present Legislation, which apparently was hastily devised to circumvent this time honored remedy.

Only recently (on December 16th, 1936) the U. S. Customs Court, Second Division, in the case of *Marshall Field & Co.* v. *United States, Treasury Decisions, volume 70, No. 26, issued December 24th, 1936, decision No. 48722, pages 93-115,* held that Title VII of the Revenue Act of 1936 is unconstitutional. Judge Kincheloe, writing the prevailing opinion for the court, said at page 102:

> "We have considered said Revenue Act of 1936, and especially Title VII of same, carefully and studiously, and all the briefs filed by the attorneys on both sides in this case. After a thorough deliberation *we are of the opinion that there is no legal difference between Section 21(d) supra, of the agricultural act of August 24, 1935, and Title VII of the Revenue Act of June 22, 1936. Both undertake to amend an unconstitutional act and the same act. Said Title VII sim-*

ply provides, in our judgment, for a somewhat different procedure but for the same purpose. If, as the Supreme Court says in the *Rice Mills* case, *supra,* that the changes made in the said amended agricultural act of August 24, 1935, 'do not cure the infirmities of the original act' and 'the exaction still lacks the quality of a true tax', and that 'It remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress', then, by the same reasoning, does not said Title VII of the tax act seek in principle to do the same thing? We think so. *Therefore, in our judgment, it does not cure the infirmities of the original act and this exaction still lacks the quality of a true tax, and remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress.*" (Italics ours.)

And at page 104 in said opinion, the court said:

"We therefore hold that the whole of said Title VII is unconstitutional, null, and void because, first, *it does not cure the infirmities of the original Agricultural Adjustment Act,* which was the basis of the decision in the *Butler* case, *supra;* second, because said Title VII of said tax act does 'not affect the rights of the' plaintiff herein; *third, because said Title VII is an effort to effectuate a proceeding under a law already held unconstitutional, and affords plaintiff no adequate remedy at law; fourth, it violates the Fifth Amendment to the Constitution of the United States in that, in our judgment, it deprives this plaintiff of his property* (the compensating tax the subject of this controversy), *without due process* of law; and fifth, that *it does not and cannot ratify or confirm an unconstitutional act of Congress* * * *." (Italics ours.)

In a concurring opinion in that case, Judge Dallinger said at page 114:

> "Therefore, while it is true as a general proposition that there is no vested right in a particular mode of procedure, and that each Congress may establish a different one (*Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557; *Campbell* v. *Iron-Silver Min. Co.*, 83 Fed. 643), nevertheless, *where the Government, as in the instant case, has collected import duties under an unconstitutional and void statute, and a suit to recover the same has been commenced by the plaintiff in good faith in a court specially established by law for the trial of such cases, the taking away by a subsequent act of Congress—in this case by the Revenue Act of 1936—of such judicial remedy, and the substitution therefor of an inadequate remedy at law for the recovery of the duty thus illegally exacted, is a repudiation of an implied contract on the part of the Government to refund moneys unlawfully collected, and does deprive the plaintiff of a vested right without due process of law. Such subsequent legislation, in this case Title VII of the Revenue Act of 1936, is therefore unconstitutional and void.* (Citing cases) * * *." (Italics ours.)

We therefore join in the prayer that the decree of affirmance of the Court below should be reversed.

Respectfully submitted,

BENNETT E. SIEGELSTEIN,
As Amicus Curiae.

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MAR 17 1937
CHARLES ELMORE CROPLEY

No. 667.

In the Supreme Court of the United States

OCTOBER TERM, 1936.

ANNISTON MANUFACTURING COMPANY

v.

HARWELL G. DAVIS,
Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF PACIFIC MILLS

MALCOLM DONALD,
Amicus Curiae.

EDWARD E. ELDER,

HERRICK, SMITH, DONALD & FARLEY,
Boston, Massachusetts,
Of counsel.

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In The

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 667.

ANNISTON MANUFACTURING COMPANY

v.

HARWELL G. DAVIS,
Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file this brief as *amicus curiae* in the above-entitled suit.

Your petitioner asks to file said brief on behalf of Pacific Mills, a corporation organized under the laws of the Commonwealth of Massachusetts, which is engaged in the processing of cotton on an extensive scale. It has paid, under protest, to the Government a very large sum of money as processing taxes, with respect to which it has filed petitions for refund.

It is genuinely interested and will be substantially affected by the decision of the questions which are presented in this suit. The Solicitor General of the United States and counsel for the Petitioner have assented to the filing of this brief, and their assents are filed herewith.

Respectfully submitted,

MALCOLM DONALD.

March 19, 1937.

In The

Supreme Court of the United States

October Term, 1936.

No. 667.

Anniston Manufacturing Company

v.

Harwell G. Davis,
Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT.

This brief is filed on behalf of Pacific Mills by Malcolm Donald as *amicus curiae,* and counsel.

For a statement of proceedings, we refer to the brief of petitioner.

To avoid repetition of arguments, we shall confine ourselves to one point:—

Underlying the decision of the Court of Appeals is the assumption that Congress had power by statutes prospective in operation to *abolish the common law*

under which a right of action would accrue *against a revenue officer* to recover money exacted under color of office but in excess of authority, and paid under duress and protest, and *substitute a statutory system of law* whereby on the occurrence of the same or a different set of operative facts a right of action would accrue *against the United States, with the remedy*—suit against the United States or its nominee—*in the unlimited control of Congress.*

Our point is, that the assumption is unsound, its doctrine susceptible of application to the whole field of federal power in situations where government comes in conflict with the individual, with results disastrous to the security of private rights and the integrity of the Constitution.

SUMMARY OF ARGUMENT.

The public importance of this proceeding lies in the fundamental, although unexpressed, assumption of the Court of Appeals, that Congress had had the power to abolish the common law which allowed a right of action against a revenue officer for the recovery of moneys illegally exacted, and to substitute a statutory rule under which a right of action might accrue solely against the United States, enforceable by suit against the United States or its nominee, but only so long as Congress might permit.

If Congress had the assumed power, it also possesses power to enact that no public officer, civil or military, shall be personally liable for acts which invade private rights, and to substitute a statutory law giving the wronged individual a right of action against the sovereign itself, which right the sover-

eign is not bound to allow to be the basis of suit in any court.

The effect of affirming that Congress possesses such a sweeping power would be two-fold.

It would leave the citizen in his relations to Government at the mercy of Congress, with a remedy available only at the pleasure of Congress. It would leave to Congress, which had enacted a statute, the power to say whether or not its constitutionality should come before the courts for review.

Our contention will be that Congress does not possess the power attributed to it by the Court of Appeals, and that the exertion of such a power, if possessed, would be fraught with the most serious consequences both to individual rights and to the structure of our Government.

We concede that Congress might have changed the common law, by altering the operative facts upon the happening of which a right of action should accrue *against the collector*, provided the right of action thus allowed remained substantially adequate. Indeed, this is what Congress, in establishing its "system of corrective justice" had done, and thereby had recognized, and not defied, a principle of jurisprudence which is fundamental in our governmental system, which is that public officers do not share the sovereign immunity, and are not protected by their offices, but must answer for their acts in courts of justice, whenever such acts invade private rights.

* * * *

This Court in *United States* v. *Butler*, 297 U. S. 1, held that the processing and floor stocks taxes were illegal exactions lacking the quality of a true tax; that they were a means for effectuating the regula-

tion of agricultural production, a matter not within the power of Congress. *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113.

The Agricultural Adjustment Act was not a law and the so-called tax was not a tax. The Act conferred no right upon the Collector to exact processing and floor stocks taxes from the plaintiff. It imposed no duty upon him nor afforded him protection as an individual from the consequences of his acts. *Norton* v. *Shelby County*, 118 U. S. 425, 442; *Hopkins* v. *Clemson College*, 221 U. S. 636.

> "To take a man's property under pretense of taxation, for a purpose for which taxation is not admissible, is not due process of law, but unlawful confiscation."
>
> *People* v. *State Treasurer*, 23 Mich. 499, 502;
>
> *Frick* v. *Pennsylvania*, 268 U. S. 473, 488.

It was never the design or purpose of the framers of the Constitution that the Congress should establish agents of the federal government in the several states and then command them to collect from the citizens of the several states an unlawful exaction in the guise of a tax. If a man voluntarily accepts a position in the revenue service of the United States he must assume the risk that he may be called upon by his superiors to enforce illegal exactions; and that if that situation arises he must either disobey instructions, or invade private rights and thereby subject himself to personal liability. Of course if he follows instructions and sustains loss he is entitled to indemnity. Such was the common law. *Tracy* v. *Swartwout*, 10 Peters, 80, 98-99; *Elliott* v. *Swartwout*, 10 Peters, 137, 154.

If illegal taxes are collected and deposited in the Treasury, the detention of the money by the United States is immoral. *Bull* v. *United States,* 295 U. S. 247, 260. A duty to make restitution arises, and a corresponding right to refund accrues to the aggrieved party. But since the United States enjoys sovereign immunity it cannot be impleaded without its consent. Until such consent is given, the aggrieved party, as against the United States, has a right without a remedy. And it is the doctrine of this Court that if consent to sue be given it is a privilege, and not a right protected by the Fifth Amendment. *Lynch* v. *United States,* 292 U. S. 571, 581. Consent may be withdrawn although the effect is to render unenforceable a vested right.

The right of action which the common law gave against the Collector, once vested, became property protected by the Fifth Amendment from the arbitrary exertion of governmental power, and the injured person was not dependent, for his remedy, upon the consent of Congress.

* * * *

It was the doctrine of the Court of Appeals that the common law had been abolished before the plaintiff paid the money he seeks to recover in this action, and that the only law left to him and applicable for redress against the illegal exaction, was a statutory law which permitted a right of action solely against the United States. For the enforcement of that right he might sue either the United States directly, or sue the Collector; but, if he sued the Collector the Collector was sued in a representative capacity only, not as an individual.

It is our contention that Congress was without power to take away from persons within a state the benefit of all law under which a right of action would accrue to them against another person within the state who might illegally collect money from them under color of office.

* * * *

There could have been no public policy served by so changing the law that never could Collectors be personally liable; the attempt to make such change, if it had been made, would have been outside of the delegated powers of Congress, and in violation of the Fifth Amendment.

We are well aware of the doctrine that taxes are the life-blood of the nation, and their prompt collection a matter of public exigency. The same does not hold true of illegal exactions. To permit illegal exactions to be made under the guise of taxes directly encourages the enactment of taxing acts of doubtful constitutionality, the piling up in the Treasury of huge sums of money, and their expenditure for unlawful purposes; tempts the conscience of the sovereign to exert devious means to avoid restitution, and by specious arguments to convert an immoral detention into righteous possession. But since it cannot be known until the final adjudication of this tribunal whether an exaction is or is not illegal, we may concede that provisions designed to prevent delay in collection of exactions demanded by Congress, although an extreme use of power, have been sustained as valid exercises of the power of Congress, applicable to all exactions, whether legal or illegal, pending final determination of the question of constitutionality. Forbidding the use of injunctions in tax cases is sustainable, but represents the limit to which the power of

Congress over remedial law may be supposed to extend.

The very fact that in tax cases execution precedes judgment makes all the more necessary the strict maintenance of rights and remedies for the recovery of money illegally exacted.

It was within the scope of the power of Congress to collect taxes, to impose conditions designed to facilitate investigation, to prevent the prosecution of stale claims, to indemnify the Collector against acts done under instructions, or otherwise with probable cause. It was within the power of Congress to dispense with the requirement of duress and protest, because that also facilitates collection, and recognizes what is the practical truth, that there is an implied duress wherever the individual is called upon to pay taxes and knows that if he does not pay them they will be collected by summary process with the addition of penalties and high interest charges for non-punctuality.

But none of these reasons of public policy can justify the total abolition of those salutary rules of common law which made the individual responsible for the invasion of private rights, even although such invasion was in the name of authority, and even in the belief that the authority was rightfully wielded. To exert such a power is never necessary nor proper in the collection of taxes; it is not an aid to the collection of taxes, but an aid to the immoral detention of money illegally collected. If no right of action can accrue against the Collector personally, the individual who never had the benefit of injunctive process to test, before payment, his liability to an exaction, is thrown for his remedy to the enforcement of his right against the United States and thereby subjected to the whim or caprice of the very body which

ordained that the unconstitutional exaction should be imposed and collected.

The ancient common law which made the officers of the King individually responsible and which was in force in this country at the time of the adoption of the Constitution, the basic principle that there should be a remedy for every wrong, and that confiscation by unlawful taxation is in violation of the Fifth Amendment, combine with other weighty considerations to throw the mantle of protection of the Fifth Amendment over the right of action against an individual unlawfully exacting money under color of official authority. To strike down this ancient protection afforded by the common law, is not to aid the collection of taxes, but is to aid in the confiscation of property.

The personal liability of public officers acting in excess of authority, either because the statute under which they pretend to exert authority is unconstitutional, or because they exceed the bounds of a valid statute, is a doctrine of the utmost importance to our system of constitutional government.

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."
>
> "It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."
>
> (Mr. Justice Miller, in *United States* v. *Lee,* 106 U. S. 196, 220.)

If it had been within the power of Congress, as the Court of Appeals assumed, to abolish the common law which permitted recovery against the Collector, it would be equally within the power of Congress to exempt from liability public officers of every kind,—military, naval and civil, in every department of the government, and leave the individual wronged by illegal, unconstitutional invasions of property rights at the mercy of a central government which might or might not, in its mercy and beneficence, maintain for them the privilege of bringing suit against the United States. If the individual may lawfully be left to entreat Congress for what he might formerly have demanded from the Collector, if supplication alone may remain to the citizen despoiled by confiscations, there is no limit to the variety and number of illegal exactions which Congress may impose. In the case of the imposition of a direct tax without apportionment, or a tax upon exports, how is the validity of the exaction to be tested unless action may be brought as of right against the individual responsible for enforcing the confiscatory and unconstitutional legislation?

It must be clear that the flow of litigation affecting fundamental rights, which makes possible the exertion of the power of judicial review to maintain the balance between the states and the nation, the separation of powers and the constitutional rights of the individual, would be dried up at the source if no cases or controversies could be brought before the courts except those permitted to be brought by the organ of government responsible for the challenged legislation.

If the recovery of property confiscated by agents of the government acting pursuant to an unconsti-

tutional federal statute and the opportunity to test the validity of such statute, is to be left to the unhampered discretion of the body that enacted the challenged law, it spells the end of right vindicated through the law and leaves to the citizen only entreaty. It reduces the Constitution to pious words, not a command from the people obligatory upon all departments of the government.

> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."
>
> (Mr. Justice Miller, in *United States* v. *Lee*, 106 U. S. 196, 221.)

* * * *

I.

THE ISSUE TO BE DISCUSSED IS WHETHER THE DESTRUCTION OF THE PERSONAL LIABILITY OF PUBLIC OFFICERS WAS WITHIN THE POWER OF CONGRESS, AS APPLIED TO COLLECTORS OF INTERNAL REVENUE.

The Court of Appeals denied redress to the plaintiff not because it had failed to state a cause of action against the defendant in conformity with statutory provisions, which was not denied; not because the Court believed that the limitations of Title VII were applicable and valid, upon the discussion of which question the Court felt it "could not enter"; not because Congress had exerted its control over the Federal Judiciary to withdraw jurisdiction of the action from the Federal courts; but because the suit was "in reality not against the appellee but against the United States", for which the Collector was a mere "proxy", and the consent of the United States to the maintenance of the suit had been withdrawn.

That Congress possesses the power as agent for the sovereign, to grant, condition, withhold and withdraw the consent of the United States to be impleaded; that consent, although once given, may be withdrawn although vested rights are thereby rendered unenforceable (*Lynch* v. *United States*, 292 U. S. 571, 581); that withdrawal of consent deprives any court in which an action against the United States is pending, of jurisdiction; we do not deny.

Nor do we contend that if the Collector *was* a "proxy"—a mere representative of the United States for purposes of suit, that Congress' power to with-

draw consent was less than it would have been had the suit been against the United States by name.

The issue we shall discuss is whether the destruction of personal liability of public officers was within the power of Congress, as applied to the Collector of Internal Revenue.

* * * *

By the phrase "destruction of personal liability of public officers" we refer, and hereafter shall refer, to legislation by Congress in the following situation:

Prior to the legislation, under the law of a State, a right of action will accrue against a public officer personally, upon the occurrence of a certain "aggregate of operative facts." Congress then, by an act or acts prospective in operation, provides that no right of action against the public officer personally shall accrue, but that upon the happening of the same, or a different, set of facts, a right of action against the United States shall accrue, with a remedy by suit against the United States, or an officer of the United States representing the United States for purposes of suit.

Of course it is conceivable that Congress might provide by an Act, prospective in operation, not only that there should be no liability on the part of an officer of the revenue to respond in damages to a person injured by the enforcement of an unconstitutional exaction in the guise of a tax, but *also,* that there should be neither right nor remedy against the United States. But, to thus simultaneously prevent any right and remedy, either against the United States, or against the enforcing officer, from ever accruing, would be clearly arbitrary, unconstitutional and void.

It is the technique of substitution, and SUBSEQUENT *extinction of remedy which is insidious, and which we propose to consider.*

The substitution of a right and remedy against the sovereign for a right and remedy against the enforcing officer, to be prospectively applied when injury occurs, has a superficial appearance of fairness and adequacy, and the legislature may intend, at the time the statute is enacted, to make a fair and adequate provision. But legislatures may change their minds. It may be inconvenient, after large sums of money have been collected under an unconstitutional act, to pay them back. *It is the uncontrolled power of Congress, in the name of the sovereign, to withdraw consent to be sued after the injury has been done, which is the instrument by which injustice may be successfully perpetrated. Our definition of "destruction of personal liability of public officers" refers to prevention of the accrual of future personal liability of public officers,* PLUS *a provision substituting sovereign liability, and consent to be sued.*

* * * *

In the phrase "personal liability of public officers" we include several principles:—

(1) That an officer does not share the immunity of the sovereign whose agent he is;

(2) That action or suit against an officer is not by reason of that fact alone a proceeding against the sovereign or one to which the sovereign is an indispensable party;

(3) The defendant to a suit or action is not protected from liability *in* that proceeding by

(a) The fact that he is a public officer and that the acts complained of were by color of office;

(b) The fact that he was enforcing a statute, unless

(i) the statute is constitutional with respect to the acts complained of; and

(ii) the acts were within the scope of power conferred by the statute;

(c) The fact he was executing instructions of a superior, unless the superior had lawful power and authority to give the instructions, within the terms of a valid statute.

* * * *

We admit that Congress might have abolished the common law under which rights of action might accrue against a Collector of Internal Revenue for illegal exactions, and substituted therefor a statutory law giving a right of action *against the Collector* dependent upon a different aggregate of operative facts; or Congress might without abolishing the common law have added to or subtracted from the critical facts upon which the right of action against the Collector depended, provided the substituted right of action were adequate. We assert that one of these things Congress did—it is immaterial which—rather than substitute for the common law a statutory law under which no right of action could arise against the Collector, but only against the United States.

We do not propose to discuss the proposition that it was never the intention of Congress, by legislation passed prior to the payment of the money involved in this suit, nor the necessary effect of the

operation of that legislation, to prevent the accrual of a cause of action against the Collector personally. The statutes and decisions are fully discussed in the brief of petitioner. *We endorse their argument.* Nor do we consider the power of Congress, after a cause of action has accrued against the Collector personally, to strike down that cause of action either with or without substituting the United States as a defendant. With this compulsory novation we are not here concerned. That a right of action, once accrued, is *property* which cannot, consistently with the Fifth Amendment, be destroyed or substantially impaired, we regard as settled law.

It is our purpose, rather, to show the far-reaching and disastrous consequences of adopting the unexpressed assumption of the Court of Appeals that Congress ever had possessed the power, by legislation prospective in operation, to prevent the accrual of any right of action against the Collector personally; and that the assumption was unwarranted in law.

II.

THE DESTRUCTION OF THE PERSONAL LIABILITY OF A PUBLIC OFFICER, AS APPLIED TO A COLLECTOR OF INTERNAL REVENUE IN THE CASE OF AN UNCONSTITUTIONAL EXACTION IN THE GUISE OF TAX, IS NOT WITHIN THE POWER OF CONGRESS.

A. NOT COMPRISED WITHIN THE POWER DELEGATED TO CONGRESS TO COLLECT TAXES.

Personal liability of public officers was a doctrine of common law, and as such prevailed in the several states at the time of the Revolution and thereafter. The Constitution and laws passed pursuant thereto are the supreme law of the land, and consequently any necessary or proper provisions in aid of the collection of taxes would supersede common law in the several states so far as inconsistent. Legislation passed by Congress to effectuate the collection of taxes has resulted in a multiplicity of laws and a large organization to administer those laws. But with respect to the liability of the Collector, the legislation may be divided into four classes:—

(1) Laws regulating the relations between the Government and the Collector, such as provisions requiring that receipts be paid immediately into the Treasury, that the Commissioner may indemnify the Collector for judgments obtained against him, that upon certificate of probable cause no execution shall issue against the Collector, but the judgment be paid out of the proper appropriation in the Treasury.

(2) Provisions designed to facilitate the investigation of claims, to regularize procedure, and to prevent the prosecution of stale claims,—such as the requirement of a preliminary appeal or claim for refund, regulations prescribing the form of such claims, and limitations of time for filing claims, and bringing action. The abolition of the requirement of protest is possibly due to a recognition of the fact that a claim for refund serves the purpose of a written protest.

(3) The abolition of the requirement of duress in 1924 may be attributed to two causes:—(a) recognition that penalties and a high rate of interest for delinquencies coupled with the established policy of the government to enforce payment by distraint, exerted strong pressure on the taxpayer, and (b) that to require the taxpayer, in order to be certain of proving duress, to wait until threatened with distraint of his property, was not only injurious to the taxpayer, but retarded collections.

(4) Provisions designed to prevent the use of legal process to delay payment. Revised Statutes, sec. 3224, prohibiting injunctions, is the principal provision of this sort. The reasons for permitting injunctions where the tax is challenged on the ground of unconstitutionality are that taxes are the "life blood of the nation," and that due process, in the procedural sense, permits execution before judgment in the collection of the revenues, while presupposing a right and the maintenance of an adequate remedy, to recover money illegally exacted.

It is submitted that the prohibition of injunctions where unconstitutionality is alleged, goes to the limit of what should be permitted under a government of

limited powers. Where the challenged exaction involves large sums of money, and has a sweeping effect upon industry, we believe that it would be of greater social utility to permit the use of injunctions, with proper security, to secure a prompt adjudication of the question of constitutionality, rather than to permit collections to be made over a long period of time, with the grave consequences which follow the possession by the Government of vast sums of money to which it is not entitled.

The destruction of the personal liability of Collectors of Internal Revenue would serve none of the purposes outlined above.

In *Cary* v. *Curtis*, 3 How. 236, 245, the decision was put on two grounds: first, the right to assert sovereign immunity, and, second, control over the jurisdiction of the Federal Courts. Both grounds are untenable.[1]

It is significant that the opinion of the majority does not even intimate that Congress, in the exertion of power to collect taxes, could exempt the Collector from personal liability. If the decision is to be sustained, it must be upon the theory that under the *power to regulate foreign commerce* Congress might exert a power of exclusion, as under an embargo, and impose conditions upon which goods might be admitted. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 191; *U. S.* v. *Marigold*, 9 How. 560, 566; *The Abby Dodge*, 223 U. S. 166; *Buttfield* v. *Stranahan*, 192 U. S. 470;

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[1] Actions at common law in the state courts had been maintained against Collectors of customs since the organization of the Government without consent of Congress. The power over the jurisdiction of Federal Courts could not have prevented the maintenance of an action in a state court. There had been no plea to the jurisdiction.

Oceanic Navigation Co. v. *Stranahan,* 214 U. S. 320; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 714-715. Justice Story, who, with Justice M'Lean, dissented in the Cary case, was undoubtedly the most profound constitutional lawyer then on the Supreme Court bench. Congress, in session when the decision was rendered, by the Explanatory Act of 1845 (5 Stat. 727), without any recorded dissent, nullified as far as it could the effect of the decision, and specifically provided that the 1839 Act, which was the basis of the decision, should not take away, or be construed to take away or impair the right to maintain any action at law against the Collector, "and to have a right to a trial by jury, touching the same, according to the due course of law".

Since an unconstitutional exaction is not a tax, and since exempting the Collector from liability to refund moneys illegally collected is not necessary as a means of preventing the obstruction of collections, the power to collect taxes does not embrace legislation exempting the Collector from liability to respond in a money judgment to persons whom he, under color of his office, has deprived of property through the enforcement of an unconstitutional statute.

B. REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

(1) *Because it is outside the field of Federal power.*

No Federal legislation can constitute due process which is outside of the field of federal power. Due process of law in the Fifth Amendment

> "... refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law." (*Hurtado* v. *California,* 110 U. S. 516, 535.)

A right in property which is protected by the Constitution cannot be lawfully *extinguished* by Congressional action. Congress, when it directs a collector to collect an unconstitutional exaction in the guise of a tax, is ordering an *invasion* of the right. It amounts to confiscation, which is repugnant to the due process clause.

(2) *Because it is violative of that fundamental principle of right and justice which prescribes that there should be a remedy for every wrong.*

The Fifth Amendment, like the Fourteenth Amendment, was designed to protect certain fundamental principles of right and justice, and the right to have redress for an unlawful deprivation of property cannot be denied without violation of such fundamental principles. Chief Justice Taft, delivering the opinion of the majority of the Court in *Truax* v. *Corrigan,* 257 U. S. 312, said, with reference to a state statute which had been construed to permit a *subsequent* interference with the plaintiff's business whereby it was reduced from $55,000 a year to $12,000 a year,

> "A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the Fourteenth Amendment.

"The opinion of the State Supreme Court in this case if taken alone seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful." (p. 328).

* * * *

". . . The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement. It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles." (pp. 329, 330).

The case of *Burrill* v. *Locomobile Co.*, 258 U. S. 34, denied recovery against the State Treasurer of Massachusetts for collection of an illegal tax where the plaintiff had *failed to avail itself* of an exclusive remedy against the Commonwealth provided by *state statute*. The court did not need to go further than to hold that the remedy against the treasurer was in suspense so long as the state offered a remedy against itself fair and adequate. The court took pains to point out in that case that the right to modify the common law is not absolute, stating (p. 39):

> "But the common law of Massachusetts is not superior to its statutes and may be modified by them at the pleasure of the State, *at least until in some substantial sense it impairs substantive constitutional rights which it has not attempted to do.*" (Emphasis supplied.)

The reserved power of the State over common law is more sweeping than the power of Congress, which is limited to the field of delegated federal power.

* * * *

The colonists identified certain *basic principles* of the common law with the "rights of Englishmen". These basic principles, in their understanding, constituted the "law of the land" which is synonymous with "due process of law".

"There is also little question,"

says Mott,

> "that the colonists looked upon the 'law of the land' as being the common law of England and that it embodied the general rights and privileges of Englishmen." (*Due Process of Law*, p. 142.)

Whether the provisions of Magna Charta from which the due process clause was derived actually held this meaning in English law is immaterial. It is clear that it is the meaning attached to the provisions by the colonists in framing the State and Federal Constitutions that governs.

> "In so far as they gave it a content, it was this meaning that they transferred with it to the American State Constitutions and later to the Federal Constitution in the Fifth Amendment." (*Id.* at 136.)

One of the basic principles of the common law was that there should be a remedy for every wrong. So fundamental was this conception that in the Massachusetts Declaration of Rights it received separate recognition:

> "Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character." (Article XI.)

The first edition of Blackstone was published some years before the adoption of the Fifth Amendment and had wide currency and great authority in the colonies. Chief Justice Marshall quoted Blackstone in *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803):

> "In the third volume of his Commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.
>
> 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.'
>
> And afterwards, p. 109, of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

A person injured by the enforcement of an unconstitutional act of Congress may not *claim as a right* that consent to sue the United States, granted before the injury occurred, shall be *maintained for his benefit*. Such consent is a *mere license, revocable at the pleasure of the wrongdoer*, and therefore *lacks the essential quality of a true remedy*.

(3) *Importance should be attached in cases of unconstitutional taxation to the historical background of the Fifth Amendment.*

It is a well known historical fact that the first Ten Amendments comprising the "Federal Bill of Rights" were insisted upon by those who feared an invasion of civil rights and state autonomy, and were enacted as the price of ratification. Importance should be attached to the fears and apprehensions of arbitrary rule which these amendments were designed to allay. The claim of Parliament to impose internal taxes in the Colonies was regarded as conflicting with the rights of Englishmen and was one of the major causes of the Revolution. That the small farmers and others who opposed ratification of the Constitution saw in the proposed federal government a possible instrument of oppression substituted for the rule of England from which they had freed themselves, is well known to students of our history. Fear of unjust and illegal taxation was one of the principal motives of the opposition. Contemporary documents show this. For example: the writings

of Luther Martin[1] in Maryland and the series of letters published under the name of "Centinel"[2] in Pennsylvania, as well as the debates in the Ratification Conventions.

Since the actions against revenue officers for illegal collection of taxes were an established part of the common law at the time of the ratification of the Constitution, it may well be deemed that those who framed and ratified the Fifth Amendment considered the non-immunity of revenue officers to be one of those basic fundamental principles embraced in the conception of due process. To permit the federal government to establish officers in the several states and then endow them with non-liability, no matter what arbitrary and unconstitutional taxing statute they undertook to enforce, was the very sort of thing which those who demanded the Bill of Rights desired to protect themselves from, both by the Fifth and Tenth Amendments.

C. IT EFFECTUATES AN UNLAWFUL INVASION OF THE RESERVED POWERS OF STATES.

Not only does such attempted federal abolition of liability imposed by state law deprive the citizen of protection against arbitrary invasion of his constitutional right to security of property, but it also interferes with the power of the state to promote the general welfare of its citizens by affording them adequate means of protection through the courts, according to the common law. The common law, at the time of the framing of the Federal Constitution, was

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[1] Printed in Farrand, *Records of the Federal Convention*, Vol. III; refer, for example, to pp. 151, 159.

[2] Printed in McMaster & Stone, *Pennsylvania and the Federal Constitution*; refer, for example, to letter V, at p. 610.

the common law as it existed and was enforced in each of the several states. It was the ancient instrument by which Government, through the courts, undertook to protect rights of life, liberty, and property, and regulate the social and economic relations of the citizens. The state, of course, had and has the right to change the common law, consistently with fundamental principles of justice and equity; but in view of the conditions of the times, the fear of consolidation which was everywhere present, coupled with the fear of unjust, oppressive and illegal taxation, it is reasonable to conclude that those who framed and ratified the Tenth Amendment would have regarded the destruction of individual liability of officers enforcing unconstitutional exactions, under authority of the central government, to be not only an invasion of private right, but an interference with the power and duty of the state to protect its citizens.

III.

THE CONSEQUENCES OF PERMITTING THE DESTRUCTION OF PERSONAL LIABILITY OF A PUBLIC OFFICER WOULD BE TO PERMIT THE CONFISCATION OF PRIVATE RIGHTS IN PROPERTY IN THE WHOLE FIELD OF POWER WHEREIN THE SOVEREIGN, THROUGH ITS OFFICERS, IS BROUGHT IN CONFLICT WITH THE PUBLIC.

The state is an ideal entity; it can act only through persons—its officers and agents. It is immune from suit for wrongs committed in its name, unless, through the legislature, it consents to suit. The consent does not confer a right, protected by the due process clause, but a revocable license. When an unconstitutional law is enacted, those who enforce it are not wielding the authority of the state, because the legislature can commit the state only to constitutional acts. The enforcing officer is therefore deprived of justification. He is liable individually to the person who has been injured. Neither his office, nor the "apparent validity" of the statute, protects him; he cannot claim the immunity of the state, nor is an action against him an action against the state. When the cause of action accrues, it is property, protected by the due process clause.

Such is the doctrine of our law.

Opposed is the theory of public rule which would permit the destruction of the personal liability of public officers, so that no right of action against them could ever vest. It would give the injured party a right of action against the sovereign, enforceable only

if and when the legislative body, which had imposed an unconstitutional exaction, might see fit.

The founders of our government intended that security in life, liberty, and property, should forever remain free from arbitrary acts of government, and protected from attack through the usurpation of power. So long as the doctrine of the personal liability of public officers remains unimpaired there will always exist a remedy, either preventive or compensatory, or for specific restitution, against unconstitutional invasions of private right. Within the field where the principle of personal liability of public officers is enforced, constitutionally protected rights may be vindicated against the arbitrary exercise of power. The field where that beneficent principle applies is the zone of safety.

But if the right of the individual to be secure in life, liberty or property has been invaded by officers of government, or is threatened with invasion, and the injured party is obliged to recognize that the enforcing officer is exempt from all liability, and he must look for satisfaction to the sovereign, and employ the means of redress which the sovereign in its bounty may choose to bestow upon him, then those rights, although designed to be protected by the constitution, are in a zone of peril.

And the reason for this is so plain that it cannot be misunderstood,—a right which can be enforced only with the consent of the wrongdoer is in no true sense protected. If the debtor may say when he will pay his debt, or whether or not he will pay it at all, or pay it in part only; if he may say to the creditor, "You may not sue me until I am ready to be sued, and may recover only as much as I permit you to recover", there is in no real sense, a sanction for the obligation.

One who is apparently obligated to do an act by virtue of a written instrument, is obligated in a technical sense merely, if he can dictate whether or not the obligation may be enforced.

Therefore we say, that to take the right of the individual to security in life, liberty and property out of the zone of safety and put it in the zone of peril, to take it out of the field wherein a remedy is available in the due course of justice, and place it in the field where the remedy is dependent upon the bounty of the wrongdoer, is to defeat the intention of those who framed and ratified the Federal Bill of Rights.

It is true that the control of Congress over sovereign immunity is limited to the *remedy*. Theoretically the *right* against the sovereign may continue to live, but its life is pale, frustrated and unsubstantial. A right without a remedy is a mere phantom of jurisprudence, which can give no redress for an unconstitutional deprivation of property.

The exaction of money, or the confiscation of other property, through the acts of governmental agents enforcing an unconstitutional statute is a violation of a fundamental right, a taking of property without due process of law. For such acts, under the salutary doctrine of the common law, the agent is liable personally. He is a wrongdoer—although guilty of no moral fault. One who voluntarily assumes public office, for the sake of its emoluments or its power, is subject to the corresponding burden, of justifying at his personal risk, the laws which he enforces. This is a rule of sound public policy. For such personal loss as he may suffer, where he acts with reasonable cause, or by direction of his superiors, the Government owes him a duty to indemnify him. Such is the safe and reasonable doctrine.

If the legislature may say that the law which formerly made such acts a legal wrong, shall no longer be the law, it follows that the officer is not only exempt from a money judgment, *but may not be enjoined against the commission of such acts.* This is so because the jurisdiction in equity in such cases is not based on the enforcement of a right created under the substantive law of equity, but is an adjective jurisdiction, remedial solely, designed to supplement legal remedies where the remedy at law is inadequate. If, under legislative fiat, no legal wrong can ever be attributed to the officer, he is exempt from injunctions as well as from actions for damages.

To commit all remedies, legal or equitable, to the pleasure of the sovereign as represented by the legislature, is the essence of arbitrary rule. The legislative control over sovereign immunity is an instrument of power unique and unlimited. To trust the protection of private rights to the exertion of this power, is to confide them to the unrestrained discretion of the same body which has passed the unconstitutional statute under which the citizen's rights have been invaded.

We shall cite typical cases to illustrate the wide scope and importance of the doctrine of the non-immunity of public officers. The following cases deal with acts done in excess of statutory authority or under a statute which was unconstitutional, or which were otherwise lacking in legal justification, and hold the enforcing officer not immune from suit and/or not exempt from liability in a suit.

The action of trespass as a remedy against illegal seizures in connection with customs revenue is of great antiquity, there being instances of its use as early as the reign of Edward I. (Hall, *Customs Rev-*

enue, Vol. 2, p. 42, quoted in Freund, *Administrative Powers over Persons and Property,* p. 248.)

In *Mostyn* v. *Fabrigas,* Cowper 161, (1774), action was maintained against the governor of Minorca for assault and false imprisonment for acts done in the suppression of mutiny.

The familiar cases of *Elliott* v. *Swartwout,* 10 Peters 137, *Tracy* v. *Swartwout,* 10 Peters 80, *Bend* v. *Hoyt,* 13 Peters 263, state the doctrine of the common law with reference to actions against public officers for the recovery of money illegally exacted, with citation of authorities.

In *Wise* v. *Withers,* 3 Cranch 331 (1806), an arresting officer serving warrant of distress of court martial to satisfy a fine levied upon person exempt from military duty was held liable in trespass, since the court was without jurisdiction. Chief Justice Marshall said "The court and the officer are all trespassers." (p. 337.)

In *Little* v. *Barreme,* 2 Cranch 170 (1804), the Captain of American frigate was held liable for the seizure of Danish vessel, although acting under instructions, since the instructions could not "legalize an act which, without those instructions, would have been a plain trespass." (p. 179.)

In *Gelston* v. *Hoyt,* 3 Wheat. 246 (1818), a Collector of Customs was held liable for the seizure of a ship for an alleged violation of neutrality laws, where no such violation had occurred.

In *Teal* v. *Felton,* 12 How. 284 (1851), a local postmaster was held liable for conversion of a newspaper, as claim for excess postage was not countenanced by the Act of Congress under which he sought to justify.

In *Slocum* v. *Mayberry*, 2 Wheat. 1 (1817), an action against a surveyor of customs and collector to replevin the cargo of vessel detained under an embargo act, was maintained, since the Act applied only to the vessel and not the cargo.

In *Meigs* v. *McClung's Lessee*, 9 Cranch 11 (1815), an action of ejectment against military officers to recover possession of land on which the United States had erected a fort, was maintained.

And see *Wilcox* v. *Jackson*, 13 Peters 498; *Grisar* v. *McDowell*, 6 Wall. 363; *United States* v. *Lee*, 106 U. S. 196; *Brown* v. *Huger*, 21 How. 305.

In *Osborn* v. *Bank of United States*, 9 Wheat. 738, the Auditor and Treasurer of the State of Ohio were obliged to make restitution of the amount of an unconstitutional tax illegally collected and in their possession, and were enjoined from further collections of the tax.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, detinue was held to lie against Treasurer of the City of Richmond for desk distrained in collection of tax, where the defendant had unsuccessfully sought to justify his refusal of tender.

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, a suit against Railroad Commissioners and the Attorney General of the state of Texas to restrain enforcement of railroad rates alleged to be confiscatory, was maintained.

See also *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537.

In *Ex parte Young*, 209 U. S. 123, the Attorney General of a state held properly enjoined from insti-

tuting actions or proceedings to enforce penalties and remedies in an act providing for regulation of railroad rates, where the rates were alleged to be confiscatory and the penalties so severe as to lead to the conclusion that they were designed to deter the parties affected from seeking judicial relief.

And see also *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165.

Philadelphia Co. v. *Stimson*, 223 U. S. 605. It seems that a bill will lie by the owner of riparian rights against the Secretary of War to enjoin the establishment without statutory authority, of harbor lines which would diminish the use and value of the plaintiff's property.

And see *Goltra* v. *Weeks*, 271 U. S. 536.

In *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, suit was maintained against the Secretary of the Interior and Commissioner of the Land Office for the protection of a right of way from an order of revocation outside of defendants' jurisdiction.

And see *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Payne* v. *Central Pacific Railway Company*, 255 U. S. 228.

Suit was maintained against the Postmaster General to enjoin exclusion from the mail, in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

In *Johnson* v. *Lankford*, 245 U. S. 541, action against a State Bank Commissioner for neglect of duty was held not an action against the State.

In *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, a bill against the State Board of Valu-

ation and Assessment and the Attorney General and his assistants to enjoin collection of franchise taxes was maintained.

In the *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318, a suit against a Secretary of State and his assistant to enjoin order of revocation of license held not to be a suit against the State.

In *State of Colorado* v. *Toll, Superintendent of The Rocky Mountain National Park,* 268 U. S. 228, a suit against a superintendent of a National Park, claiming his acts derogated from the power of the State, held not a suit against the United States.

The foregoing illustrative cases show the wide scope and utility in our system of constitutional jurisprudence of the doctrine of the personal liability of public officers. And the very breadth and extent of the field in which this salutary doctrine has functioned for the protection of constitutional rights, discloses the vast amount of mischief which may be done if legislatures, state and national, were permitted to exempt all public officers from liability and leave the citizen the slender thread of security afforded by the privilege of suing a sovereign—a thread liable to be snapped in any moment of public stress by merely voting to withdraw the consent of the sovereign to be sued.

Suppose in each of the above cases, the assumption is made that prior to the time the injury occurred a statute had provided that, in such a situation, the officer should be guilty of no legal wrong, but the sovereign should be liable and that suit might be entered in the courts against the sovereign?

And suppose further, that after the cause of action accrued, that consent had been withdrawn?

There seems no limit to the mischief which may be worked by the destruction of the personal liability of public officers. Especially in the field of taxation, where impositions may be collected by distraint, before liability is determined, is the individual in a defenseless position if the challenged doctrine prevails.

Congress might impose a direct tax, not apportioned, on every individual in the country, enforce payment by distraint, and having spent the money thus obtained, withdraw its consent, previously given, to be sued for refund.

IV.

A PERSON INJURED BY THE ENFORCEMENT OF AN UNCONSTITUTIONAL STATUTE IS NOT BOUND TO RELY ON THE LEGISLATIVE BODY MAINTAINING IN GOOD FAITH A REMEDY AGAINST THE SOVEREIGN.

Certain situations have always arisen, and always will arise, in which a person injured by governmental action must bring suit against the sovereign or be remediless. The most common is where he has loaned money to the sovereign in return for a promise to pay, and the promise is broken by direction of the legislature, or pursuant to a change in a fundamental law. Since he cannot hold public officers, in absence of express stipulation, liable on the bond or other obligation executed by them on behalf of the sovereign, nor the legislators for passing a repudiating statute or failing to make appropriations, or compel the fiscal officers in the absence of an appropriation, to pay money from the treasury, he is usually without redress. There is no personal act, in simple repudiation cases, for which any officer can be held individually liable. Consequently, action must be against the state, virtually or by name. If fiscal or other officers are made defendants, it is not because they have taken property from the plaintiff, but because it is sought to compel them as officers, as instruments of the state, to administer the relief prayed for. Such proceedings are still deemed to be against the sovereign, or the sovereign is regarded as an indispensable party, if the suit is in equity. Cf. *Louisiana v. Jumel,* 107 U. S. 711.

Since the doctrine of sovereign immunity protects also the property of the sovereign, an attempt to divest the title or destroy the property (as distinguished from a possessory action) is within its prohibition. Cf. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233; *Belknap* v. *Schild*, 161 U. S. 10; *Minnesota* v. *Hitchcock*, 185 U. S. 373.

In some cases, relief is denied because to grant it would necessitate directing and controlling by judicial decree the discretion of executive officers. Cf. *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.

The above elements are often present in combination.

Where a person has bought the bonds of a state or of the United States, or has entered into a contract which calls for the payment of money to him, he has parted with something of value voluntarily, trusting the good faith of the sovereign. But in the field of taxation, and in the regulatory field generally, what is surrendered to the state is not surrendered voluntarily, but because of the power of the state to enforce its laws. In the first case, if the state fails to carry out its obligation, repudiation results; in the second case, the property is lost through confiscation. In cases of confiscation there is no voluntary acceptance of the risk of the remedy which the sovereign may provide for the enforcement of the obligation to make compensation. The injured person ought not to be obliged to rely upon the good faith of the sovereign to maintain a remedy against itself. He is entitled to a right and remedy against the enforcing officer.

It may be urged in argument, on behalf of the de-

fendant, however, that it is not to be assumed that the sovereign will repudiate its obligations, or withdraw a remedy against itself, once given, for an admitted wrong.

There are three answers to this argument.

The first is, as already stated, that an individual aggrieved by an act of confiscation ought not to be obliged to take less, when he is entitled to more. He ought not to be obliged to rely upon an act of bounty, when he is entitled according to the theory of the common law to a right and remedy against the officer personally who has committed the injury.

The second answer is, that the philosophy of the founders did not embrace trust in government. Every constitution, state and national, reflects the fear of usurpation, of the encroachment by one department on another, of invasion of civil rights. An elaborate system of checks and balances was devised, and bills of rights were framed, to protect the people from government. The *constitutional* safeguards of the bills of rights were not designed to be metamorphosed into protection according to the *legislative* pleasure. Where the framers of our constitution did not trust government, shall we, nursing an illusion of the never-failing justice of legislative bodies, surrender rights the Founders designed to protect?

The third answer is that judicial history of the use to which sovereign immunity has been put provides a factual refutation. Legislative control over sovereign immunity has frequently been exerted to aid in the breach of public faith.[1]

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[1] The origin and history of sovereign immunity has been the subject of learned discussion which need not be repeated here. (Cf. *Chisholm* v. *Georgia*, 2 Dall. 419; *Briggs* v. *Light-Boats*, 11 Allen 157; *United States* v. *Lee*, 106 U. S. 196; *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353.)

The economic motive which has given energy to the doctrine of sovereign immunity in this country appeared before the Constitution was ratified. Hamilton in the Federalist, considering the original jurisdiction of the Supreme Court of cases in which the state shall be a party, said:

> "... It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; ..." (*Federalist*, No. 81, Ford's Edition, p. 545).

In spite of Hamilton's opinion that the suggestion was ill-founded, the Supreme Court held in *Chisholm v. Georgia, supra,* in 1792, that it had jurisdiction over an action by two citizens of South Carolina, executors of a British creditor, against the State of Georgia.

The decision met with widespread dissent which culminated in the adoption of the Eleventh Amendment. This dissent was based in part upon fear of "consolidation", but the economic motive was the originating cause of the attack:—

> "While this opposition to the Court's decision was to some extent based on divergencies of political theories as to State sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the 'numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union into the greatest confusion.' In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other

credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts."

(Warren, *Supreme Court in U. S. History*, vol 1, page 99.)

The war between the states brought in its wake impoverishment of the South, dishonest administration of reconstruction, a frenzy of speculation, and ultimate panic and depression.

"... Owing to the devastation due to the Civil War, the corruption of their 'carpet-bag' Legislatures and the financial depression after the panic of 1873, many Southern States had attempted to default in the payment of bonds issued or guaranteed by them. The extent of this repudiation had become a National scandal. 'Today more than $100,000,000 and, if we include interest, more than $200,000,000 are due to creditors from repudiating States. . . . The whole country is in disgrace by reason of this horrid spectacle,' said the *Independent*, in 1883. 'Public morality has suffered from the foul contagion. Municipal corporations have caught the disease. . . . Repudiation is simply the highwayman's morality. When practiced by States, it is power against right. As an exhibit of sovereignty, it is the sovereignty of rascality. State repudiation in this country is a criminality that has behind it millions of offenders. The people are the State and control its action.' "

(Warren, *op. cit, supra* vol. 3, pp. 385, 386.)

A number of cases involving repudiation reached the Supreme Court, of which *Louisiana* v. *Jumel*, 107

U. S. 711, may be mentioned, because of the extent of the precautions taken at the time of the issuance of the securities to prevent a successful repudiation.

The foregoing discussion, while suggestive rather than exhaustive, is sufficient to rebut any claim, proferred by government or its agents, that it is fair and reasonable to assume that a remedy, once given, will not be withdrawn to prevent the enforcement of a vested right.

Sovereign immunity is an established principle.[1] When invoked in certain cases, its application is inevitable, however unfortunate the results.[2] But it is a doctrine alien to our form of government, which is based upon the sovereignty of the people, not of a personal ruler. Whatever utility may be theoretically ascribed to sovereign immunity, its enforcement in our judicial history has been largely to aid in the breach of public faith.

The assertion that "the legislature will do no wrong" is refuted by records of the past which create no new illusions. A blind belief that never will "history repeat itself" should not lead us voluntarily to commit to that "tyranny of the majority," believed by the Founders to be inherent in unrestrained legislative control, the measure of security in life, liberty and property which the "People of the United States" intended to place beyond that hazard.

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[1] As commonly asserted, the doctrine of sovereign immunity has three branches: (a) that the sovereign is immune from suit unless it consents, and only so long as its consent is continued, and the title to its property cannot be disposed of in judicial proceedings to which it is not a voluntary party; (b) that the legislative department has *sole power* to give, condition or withdraw the consent of the sovereign, and (c) that in expressing the sovereign's will in this matter the legislature is as free from control as would be the sovereign, i.e. the people, speaking with more authentic voice through a *constitutional* provision.

We are not of course, here considering the immunity of foreign sovereigns in our courts, which is a distinct doctrine.

[2] We do not mean that it is *desirable* that the law respecting sovereign immunity remain static. A measure of judicial control has been exerted, e.g., by applying the principle of estoppel by deed where the sovereign's proprietary interest was involved; also with respect to the immunity of a quasi-sovereign territorial unit, election to submit to jurisdiction of a court has been held binding. It seems that the doctrine of estoppel and election might, with desirable effect, be applied more widely, in cases where consent has been relied on and rights vested. No impairment of the doctrine of the liability of public officers may, consistently with the security of fundamental rights, be hazarded;—emphatically not, in the present state of the law.

V.

THE DOCTRINE OF THE PERSONAL LIABILITY OF PUBLIC OFFICERS IS FUNDAMENTAL IN OUR SYSTEM OF CONSTITUTIONAL JURISPRUDENCE, AND ESSENTIAL TO THE EFFICACY OF CONSTITUTIONAL GUARANTEES OF SECURITY IN PROPERTY.

The decisions previously cited have shown the wide field within which the doctrine of the personal liability of public officers has been applied.

We have selected three quotations from opinions rendered in this Court as a medium for setting forth the fundamental importance in our limited form of government of the doctrine that officers must answer individually for their acts, which under color of authority but in excess of power, are the means by which the evil of usurped power is brought home to the individual, to his damage.

In *Marbury* v. *Madison,* 1 Cranch 137, 164-165 (1803), Chief Justice Marshall said:

> ". . . Is it to be contended that the heads of departments are not amenable to the laws of their country?
>
> "Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. 3, p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law,

> in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.' "

The decision in *United States* v. *Lee,* 106 U. S. 196, is according to an excellent authority "regarded as one of the glories of American law" (Warren, *op. cit. supra* vol. 3, pp. 395-396). The son of General Robert E. Lee brought an action of ejectment to recover possession of eleven hundred acres which had been bid in by the United States Government at a tax sale during the Civil War and later used as a national cemetery, which was at the time of the suit in the possession and under the control of military officers placed in charge by the President. Upon proof that the tax sale was invalid, judgment of possession was awarded to the plaintiff. Mr. Justice Miller, delivering the opinion of the majority of the Court, said, referring to the Fifth Amendment:

> "Undoubtedly those provisions of the Constitution are of that character which it is intended the Court shall enforce, when cases involving their operation and effect are brought before them".

Referring to the defense that the Court was without jurisdiction because the action was virtually against the United States Government, he said

> ". . . It seems to be opposed to all the principles upon which the rights of the citizen when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him

but the alternative of resistance, which may amount to crime." (pp. 218-219.)

With respect to the objection that the official position of the defendants endowed them with immunity, he said:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." (pp. 220-221.)

The doctrine of *United States* v. *Lee* was applied in the leading case of *Poindexter* v. *Greenhow*, 114 U. S. 270. The decision in this case was one which grew out of the

> ". . . notorious Mahone-Riddleberger legislation in Virginia, by which the State had practically repudiated $11,000,000 out of a refunded debt of $30,000,000, had cut in half the interest on its outstanding bonds, and had repealed the provisions of law which made coupons on its bonds receivable in payment of taxes." (Warren, *op. cit. supra* vol. 3, p. 388.)

Justice Matthews delivering the opinion of the majority of the Court, referring to *United States* v. *Lee*, *Meigs* v. *McClung*, *Wilcox* v. *Jackson*, *Brown* v. *Huger* and *Grisar* v. *McDowell*, *supra*, said:

> "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act

of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence." (p. 288.)

And again,

"In the discussion of such questions, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation." (p. 290.)

* * * *

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say *'L'État c'est moi.'* Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it." (p. 291.)

Nothing, of course, need be added to the words of these judges so eloquently and earnestly repudiating the suggestion that public officers enforcing unconstitutional statutes to the injury of the rights of individuals, are not amenable to the laws of the country.

VI.

DANGER TO PRIVATE RIGHTS IS ALSO INHERENT IN THE DOCTRINE OF "APPARENT VALIDITY" FAVORED BY THE COURT OF APPEALS.

The Court of Appeals commits itself to the support of the proposition that the Collector ought not to be liable for collecting a tax under an unconstitutional Act of Congress, for collections made prior to the time that the Act has been judicially declared to be unconstitutional. It questions the general applicability of the doctrine of *Norton* v. *Shelby County*, 118 U. S. 425, 442. *Norton* v. *Shelby Co.* has been, however, cited with approval in other situations: *Chicago, Indianapolis & Louisville Ry. Co.* v. *Hackett*, 228 U. S. 559, 566. Cf. *Hopkins* v. *Clemson College*, 221 U. S. 636, 642-4.

The far reaching consequences of adopting the view of the Court of Appeals are apparent. If a public officer may successfully defend upon the ground that he relied upon the apparent validity of a statute, no actionable wrong can exist until the challenged statute has been declared unconstitutional. Consequently, until then, no action for damages against the officer may be maintained and no bill in equity for an injunction will lie. The effect of such a doctrine would be substantially as threatening to the security of private rights as to hold that a proceeding against the officer is a proceeding against the sovereign, or that the officer is exempted from liability by his official position.

The general, the orthodox, rule denies force to "apparent validity" as a defence by the public officer.

In the following cases, "apparent validity" existed, but it was not a good defence by a public officer in a suit for a money judgment brought by a member of the public aggrieved by the officer's acts.

Atchison & C. Ry. Co. v. *O'Connor* (*Secretary of State*) 223 U. S. 280 (1911);

Dennison Manufacturing Co. v. *Wright* (*Comptroller General*) 156 Ga. 789 (1923);

First National Bank of Sturgis v. *Watkins* (*Auditor General*) 21 Mich. 483 (1870);

Cunningham et als. v. *Munroe, Administrator* (*of Estate of Superintendent of Alien Passengers*) 15 Gray 471 (1860).

The converse case, where a member of the public seeks to use "apparent validity" in support of a claim, is distinguishable. In this class falls the *de facto officer* doctrine.

In *State of Maine* v. *Poulin*, 105 Me. 224 (one of the cases relied on by the Court of Appeals), the Court said:

> "The *de facto* doctrine is exotic, and was engrafted upon law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law." (p. 410.)

Compare with the case last cited *Gross* v. *Rice*, 71 Maine 241, where the warden of a state prison was held liable in an action for false imprisonment for detaining a convict, under the apparent authority of a statute held unconstitutional.

Cases cited by the Court of Appeals are cases in which the *de facto officer* doctrine was applied, and are inapplicable outside of that limited field.

VII.

THE DESTRUCTION OF THE PERSONAL LIABILITY OF FEDERAL PUBLIC OFFICERS WOULD RESTRICT JUDICIAL REVIEW TO A FIELD DEFINED BY CONGRESS AND THUS IMPERIL THE INTEGRITY OF OUR CONSTITUTIONAL SYSTEM.

The destruction of personal liability of public officers, by giving an opportunity to close the door to litigation designed to prove that power has been usurped in violation of the Constitution, necessarily restricts the scope of the operation of judicial review, and thereby imperils the integrity of our constitutional structure.

The power of judicial review, so firmly established, requires no defense. Without it, the "tyranny of the majority" so greatly feared by the founders of our government, might in any season of national stress over-ride the separation of governmental powers, the division of powers between the federal and state governments, and the constitutional rights of individuals. But we can not refrain from inserting at this point the words of an ex-President of the United States, Woodrow Wilson, as quoted by this tribunal:

> "It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.
>
> "Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our

definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual.

"Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." (Woodrow Wilson, *Constitutional Government of the United States*, pp. 17, 142, quoted in *Evans* v. *Gore*, 253 U. S. 245, 251-2.)

Since the judicial power of the United States extends only to "cases and controversies" (*Chicago &c. Railway Co.* v. *Wellman*, 143 U. S. 339, 344-345), any artificial diminution of the flow of litigation into the courts diminishes the opportunity for the exercise of this function, and thereby imperils our constitutional safeguards.

Although suits may be brought only to protect a private interest, it is recognized that the public interest involved in maintaining a constitutional right may be more important than the private interest to be protected by the litigation. (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.)

Hence it may be not only the right but the duty of the citizen to resist the enforcement of an unconstitutional law. (cf. *O'Donoghue* v. *United States*, 289 U. S. 516, 533-4.)

But neither the interest nor the duty of an injured person, nor the importance of the public interest at stake, will be of any avail, if legislatures, state or national, have power to strike down all law under which a right of action may arise against a person holding public office, to hold him accountable for acts done under color of authority, and ordain that the only rights which may arise in any situation of governmental usurpation, shall be rights against the sovereign. There will be no remedy that can be made to endure except through the beneficence of the body responsible for the usurpation.

Except in the relatively small class of cases in which the government might be obliged to become the actor in an action, in which case unconstitutionality might be pleaded as a defense, the opportunity to vindicate the public interest and private right against legislative encroachment would seldom be exercised

except in the uncontrolled discretion of the body responsible for the challenged legislation.

The public and private consequences of the doctrine of the Court of Appeals condemn it utterly. History has not instructed us to rely with confidence upon the willingness of public bodies to submit their conduct to judicial review. It was not the purpose of the framers of the Constitution to create a government under which the Congress might say what acts enacted by it, and alleged to be *ultra vires,* might be made the subject of judicial review, and what might not. In ordaining that the Constitution should be the "supreme law of the land", the Founders did not mean that it should be the supreme law of the land in such cases as the Congress might permit it to be the supreme law of the land, and cease to be the supreme law of the land whenever the Congress might wish otherwise. The ability to submit, or not to submit, the acts of Congress to judicial review at the mere pleasure of Congress, is of the very essence of arbitrary power.

The debates in the Federal Convention, and the history of the times, beginning with the speech of James Otis on the Writs of Assistance, show that it was expected that the courts would preserve the checks and balances in the Constitution and prevent that centralization of power in the hands either of the executive or of the legislative department, which was deemed in the political philosophy and experience of the day to spell tyranny. The general design was to create a "government of laws and not of men",—a government of limited and not of arbitrary power.

To foster that benign purpose should be the aim of every citizen, and of every officer sworn to uphold the Constitution. But, without judicial review by an in-

dependent judiciary, the evil results of the will to power, of the insistent pressure of economic groups, and of every other disintegrating and distorting influence, will be greatly magnified. And to the extent that the natural flow of litigation involving constitutional issues dwindles, in the same degree will the harmonizing and restraining influence of the judiciary become less and less. And if the course of our public law, by eliminating the personal liability of public officers, eventually permits the sovereign to become the sole possible defendant in all cases where the individual is brought into conflict with his government, in that day the courts will exercise in constitutional review, little more power than Congress shall be willing to permit them to exert. As to the individual, he will perhaps have a few rights left, the invasion of which by usurped power he may vindicate without leave of the legislative branch. The great body of rights which our forefathers sought to protect, for all time, against every abuse of governmental power, will have been swept away in the winds of "sovereign immunity".

Respectfully submitted,

MALCOLM DONALD
EDWARD E. ELDER

SUPREME COURT OF THE UNITED STATES.

No. 667.—October Term, 1936.

Anniston Manufacturing Company, Petitioner, *vs.* Harwell G. Davis, Collector of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 17, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner brought this suit on November 22, 1935, against the Collector of Internal Revenue to recover the amounts paid as cotton "processing" taxes (first cause of action) and as cotton "floor stock" taxes (second cause of action) under the Agricultural Adjustment Act of 1933. 48 Stat. 31, 35, 40. Petitioner alleged the unconstitutionality of the statute imposing the tax (*United States v. Butler*, 297 U. S. 1) and that claim for refund had been rejected by the Commissioner of Internal Revenue on August 16, 1935. After the enactment of Title VII of the Revenue Act of 1936, Sections 901-917 (49 Stat. 1747), petitioner amended its complaint, asserting the unconstitutionality of these provisions. Demurrer was sustained by the District Court (15 F. Supp. 257) and its judgment of dismissal was affirmed by the Circuit Court of Appeals upon the ground that the court below was without jurisdiction to entertain the action. 87 F. (2d) 773. In view of the importance of the questions raised, we granted certiorari.

Title VII, Sections 901-917, of the Revenue Act of 1936, provided a new administrative procedure for the recovery of amounts collected under the Agricultural Adjustment Act. Section 901 repealed Sections 21 (d), 21 (e), and 21 (g), of the amendments of 1935 (49 Stat. 771-773). Section 902 prescribed the conditions on which refunds should be made. Section 903 related to the filing of claims. Sections 904 and 905 prescribed periods of limitation and provided for the jurisdiction of the District Courts, concurrent with the Court of Claims, for the recovery of amounts collected as floor stock and compensating taxes. Section 906 prescribed the procedure on claims for refunds of processing taxes.

Section 907 established certain rules of evidence or presumptions to be observed in the administrative proceeding. Section 908 related to allowance of interest. Section 909 denied review of the administrative ruling by any other administrative or accounting officer. Section 910 undertook to free collectors from liability for moneys collected by him and paid into the Treasury in performance of his official duties. Section 913 defined various terms employed. Other sections laid down administrative rules not requiring attention in the present discussion.

First.—Petitioner contends that at the time it brought this suit it had a vested right of action against the Collector to recover the amounts exacted under statutory provisions held to be invalid; that this right of action could not be destroyed without violating the Fifth Amendment; that the Collector was personally liable for the amounts collected and that Section 910 which attempted to destroy that liability is unconstitutional.

The Government answers that the instant case "does not require a decision as to the power of Congress to withdraw suit entirely, both against the Collector and against the Government"; that Congress "has left a remedy against the Government which is fair and adequate in every respect". We agree with the Government's contention that if the administrative remedy is fair and adequate, other questions with respect to the liability of the Collector and the validity of Section 910 need not now be considered. We had occasion to deal with a cognate question in *Burrill, Treasurer,* v. *Locomobile Company,* 258 U. S. 34. That decision was rendered in suits brought by foreign corporations in the federal court to recover taxes alleged to have been paid to the defendant, the Treasurer of Massachusetts, under duress and in obedience to statutes held by this Court to be unconstitutional in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, and *Locomobile Company* v. *Massachusetts,* 246 U. S. 146. A statute of Massachusetts provided that any corporation aggrieved by the exaction of the tax could apply by petition to the Supreme Judicial Court and that the remedy so provided should be exclusive. As the statute contained a provision for repayment of any sum adjudged to have been illegally exacted, it was contended that it constituted a bar to a personal suit against the Treasurer who had collected the tax. This Court agreed with the defendant upon that point. The State had substituted an exclusive remedy against itself for the remedy against the Treasurer

and had guaranteed payment of the amount found to be due. The validity of the statute was sustained. We said that we did "not perceive why the State may not provide that only the author of the wrong shall be liable for it, at least when, as here, the remedy offered is adequate and backed by the responsibility of the State".

The same reasoning is applicable here. The Government has not denied its obligation to refund the amounts found in the authorized proceeding to be recoverable, but has recognized that obligation. In such a case, the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right. Nor does the requirement of recourse to administrative procedure establish invalidity if legal rights are still suitably protected. The immediate question is whether the authorized proceeding affords a fair and adequate remedy. We accordingly inquire whether the prescribed procedure gives an opportunity for a full and fair hearing and determination of all questions of fact and adequately provides for the protection of the legal rights of the claimant, embracing whatever right of refund the claimant is entitled to assert under the Federal Constitution.

Second.—With respect to floor stock taxes, no serious question is presented as to the adequacy of the remedy. The remedy by suit is expressly preserved. If the Commissioner refuses refund, suit may be brought against the United States in the Court of Claims or in the District Court for the recovery of the amount claimed to have been illegally exacted. Sec. 905.

Third.—With respect to the refunding of processing taxes, a special and exclusive administrative procedure is provided. Sec. 906. Disallowance by the Commissioner of a claim of refund, in whole or part, is made final unless within three months the claimant files a petition for hearing upon the merits by a Board of Review which the Act establishes in the Treasury Department. The Board is composed of nine members who are officers or employees of the Department and are designated by the Secretary of the Treasury. The Board is "to determine the amount of refund due any claimant with respect to such claim". The Commissioner is required to "make refund of any such amount determined by a decision of the Board which has become final". Sec. 906 (b). The hearing, upon notice, before the Board is to be open to the public and is to be conducted by a presiding officer who is either a member of the Board or an officer or employee of the Treasury Department desig-

nated by the Secretary of the Treasury. The proceedings are to be in accordance with the rules of practice and procedure prescribed by the Board with the approval of the Secretary of the Treasury save with respect to rules of evidence which are to be in accordance with those applicable in courts of equity of the District of Columbia. The claimant and the Commissioner are entitled "to be represented by counsel, to have witnesses subpoenaed, and to examine and cross examine witnesses". Provision is made to compel the attendance and testimony of witnesses and the production of books and papers from any place in the United States and to require the taking of depositions. Sec. 906 (c) (d). The presiding officers are to recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted within a specified time. The Board or a division is to make its findings of fact and decision in writing as quickly as practicable. The findings and decision of a division are to be become those of the Board within thirty days unless the Chairman has directed that they be reviewed by the Board. Copies of the findings and decision are to be mailed to the claimant and the Commissioner. Sec. 906 (e). There is a further provision as to costs and fees. Sec. 906 (f). The decision of the Board is to become final in the same manner as decisions of the Board of Tax Appeals under Section 1005 of the Revenue Act of 1926 as amended. Sec. 906 (g); 26 U. S. C. 640.

Judicial review of the decision of the Board is provided. That review may be had by a Circuit Court of Appeals or by the United States Court of Appeals for the District of Columbia, according to the residence or place of business of the claimant, or by any such court as may be designated by the Commissioner and the claimant by stipulation. Upon petition for review the Board is to certify and file in the appropriate court a transcript of the record upon which the findings and decision were based. Thereupon, the Court of Appeals is to have "exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require". Sec. 906 (g). If the claimant or the Commissioner applies to the Court of Appeals for leave to adduce additional evidence the court may order it to be taken before the presiding officer if the court is satisfied that the addi-

tional evidence is material and that there were reasonable grounds for failure to adduce it at the hearing. The Board may modify its findings and decision by reason of such additional evidence, filing its modified or new determination with the court. The judgment of the Court of Appeals is to be final, subject to review by this Court upon certification or certiorari as provided in Sections 239 and 240 of the Judicial Code.

We think that this plan of procedure provides for the judicial determination of every question of law which the claimant is entitled to raise. We find nothing in the statute which limits the judicial review to questions of statutory construction or of mere regularity of procedure. The "law", with which the decision of the Board may be in conflict, may be the fundamental law. Questions of validity as well as of statutory authority or regularity may be determined. These may relate to due process in the hearing or in the refusal of a refund. The Government does not contest this construction but on the contrary affirms it. The Government recognizes and urges that the jurisdiction given to the Court of Appeals "to modify or reverse" the decision of the Board "if it is not in accordance with law" includes the power to review all questions of general and statutory law and all constitutional questions. Thus every constitutional right which the petitioner here is entitled to invoke with respect to the refund of the taxes which it has paid may be heard and determined by the Court of Appeals and ultimately by this Court upon a review of a decision reached in the course of the prescribed administrative procedure. The Government urges, and we think correctly, that if on such a review any part of Title VII were held to be invalid, "the taxpayer may recover all of the taxes to which he is entitled under such a decision". Upon the judicial review of the action of the Board, the Court of Appeals and this Court would have power "to direct the Board to enter any designated judgment" and the Commissioner is required to make refund of any amount which may thus be determined to be due the claimant.[1]

[1] Upon this point the Government states in its brief (pp. 104, 105):

"The established rule as to the proper scope of constitutional litigation can be applied in this case with no danger of injury to petitioner. If, upon an appropriate record and in the light of an actual attempt by the taxpayer to show the incidence of the processing tax, this Court should hold any part of Title VII invalid, the taxpayer may recover all of the taxes to which he is entitled under such a decision, with interest at 6 per cent per annum (Sec. 908 (a); Sec. 614 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791). For,

Fourth. The question then is whether, despite this broad right of judicial review of the action of the Board, the administrative scheme has such inherent constitutional defects that the petitioner should not be remitted to that procedure. The inquiry has particular relation to the provisions (1) as to burden of proof, Section 902, (2) as to presumptions, Section 907, and (3) as to certain matters of administrative detail.

The burden of proof. Section 902, the full text of which is set out in the margin,[2] provides that no refund shall be allowed unless the claimant establishes to the satisfaction of the Commissioner, or of the trial court, or of the Board of Review in cases under Section 906, that the claimant bore the burden of the amount paid as tax and "has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly" (1) through the inclusion of the amount paid in the price of the product, (2) through

whether or not Section 902 and Section 907 be held invalid, the Board of Review would still remain as a mechanical means by which to enforce the decision of a circuit court of appeals or of this Court. Even if Section 902 were held invalid, and recovery allowed on mere proof of payment of Agricultural Adjustment Act taxes, the Board of Review would still have jurisdiction to review the allowance or disallowance of any claim, and the circuit courts of appeals and this Court would still have power to direct the Board to enter any designated judgment. And Section 906 (b) provides that 'the Commissioner shall make refund of any such amount determined by a decision of the Board which has become final' ".

[2] "Sec. 902. *Conditions on Allowance of Refunds.*

"No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

"(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof, or

"(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever".

reduction of the price paid for the raw material, or (3) in any manner whatsoever".

According to the allegations of the complaint, the petitioner initially did bear the burden of the unconstitutional tax, as petitioner paid it. The question for administrative determination is whether the burden of that payment has been shifted. So far as petitioner's contention may be taken to be that it is entitled to recover by reason of the invalidity of the tax, although in fact its burden has been "passed on" to another, the contention cannot be sustained. While the taxpayer was undoubtedly hurt when he paid the tax, if he has obtained relief through the shifting of its burden, he is no longer in a position to claim an actual injury and the refusal of a refund in such a case cannot be regarded as a denial of constitutional right.

That question was decided in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, and the controlling principle as to burden of proof was declared. There, actions at law had been brought, one against the United States and others against a revenue collector, to recover money alleged to have been illegally exacted as an excise tax. The ground of illegality was that the sales, with respect to which the taxes were laid, were not within the purview of the tax statute. The question concerned the authority of the court to entertain the actions in view of the provision of Section 424 of the Revenue Act of 1928 relating to refunds. Properly construed, that provision was taken "as substantively limiting the right to a refund of taxes of the designated class to instances where the taxpayer either has not directly or indirectly collected the tax from the purchaser or having so collected it has returned it to him". This "substantive limitation" was deemed to be "an element of the right to a refund of such taxes", although they were wholly invalid and not merely laid in excess of what was lawful, and hence the statute required that this element, like others, "be satisfactorily established in any proceedings where an asserted right to a refund is presented for examination and determination". We held that the provision was applicable to judicial as well as to administrative proceedings for refunds under the Act. *Id.*, p. 395. We recognized that, under the system then in force, in view of the illegality of the tax, "there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the pur-

chasers." And it was further conceded that the provision of Section 424 of the Revenue Act of 1928 applied "to rights accrued theretofore and still subsisting", and subjected them to the restriction "that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b) if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them." *Id.*, p. 401. But we were unable to conclude that in imposing this restriction the section struck down prior rights or did more "than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief". We held that there was no infringement of due process of law in that restriction or in placing upon the claimant the burden of proof. We said (*Id.*, p. 402):

"If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them".

The opposing contention was found to be particularly faulty in that it overlooked the fact that the statutes providing for refunds proceed on the same equitable principles that underlie an action in assumpsit for money had and received. That action "aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff". *Id.*, p. 403.

The circumstance that under Title VII, here involved, there is no provision for making a refund to particular persons, to whom the burden of the invalid exaction may be found to have been shifted, presents no sound distinction so far as the claimant is concerned. The controlling principle is that there is no denial of constitutional right in requiring the claimant to show, where it can be shown, that he alone has borne the burden of the invalid tax and has not shifted it to others.

Apart from this question, the gravamen of petitioner's complaint is that Section 902 demands the impossible; that it sets up a condition of recovery which in petitioner's case cannot possibly be met.

That is, that the statute not only requires the claimant to show that the burden of the tax has not been shifted, where that can be shown, but bars recovery where in the nature of the case that cannot be shown. Petitioner contends that it is within the latter class. In its amended complaint, petitioner sets forth at length the features of the operation of a cotton mill such as its own. By reason of the nature of these operations petitioner asserts that there is "an inherent impossibility" of proving whether or to what extent the burden of the taxes paid has been shifted to others.

This allegation is at best but a statement of a legal conclusion which must depend upon the facts as they appear when proof is taken. The question is whether the petitioner is entitled to insist as a matter of constitutional right upon trying out the question of impossibility in this suit rather than in an administrative proceeding where all the pertinent facts as to the course of business may be presented and the conclusions they require both of fact and law may be reached. This assertion of such a constitutional right rests upon a construction of Section 902 to the effect that if the facts, fully disclosed, afforded no basis for *any* determination as to the shifting of the burden of the tax, and hence gave no warrant for a finding that the burden had been shifted from the claimant to others, still the statute would require a denial of the right to a refund. The claimant would then stand, by virtue of the injury caused by the payment of the tax, not as one seeking relief when he had not been hurt, but as one who had been hurt by a payment unconstitutionally required and whose proved injury could not be said to have been redressed. It is in that aspect that the statute is assailed as leaving the claimant without remedy for a deprivation of his property without due process of law.

Despite the broad language of Section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or "even to come so near to doing so as to raise a serious question of constitutional law". *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 307; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Blodgett* v. *Holden*, 275 U. S. 142, 148.

When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled. There is ample room for the play of the statute within the range of possible determinations. Impossibility of proof may not be assumed. It cannot be doubted that the requirement has appropriate and valid effect in placing upon the claimant the duty to present fully all the facts pertaining to the question of the shifting of the burden of the tax and in denying relief where the facts justify a conclusion that the burden has been shifted from the claimant to others. When the facts have been shown it becomes the duty of the Board of Review to make its determination according to the legal rights of the claimant. That is the necessary import of the provision for judicial review, giving authority to the reviewing court to modify or reverse the decision of the Board "if it is not in accordance with law". Findings that can properly be made upon the evidence must thus support a decision according to legal right. And, as we have seen, the reviewing court, and finally this Court, may direct the Board "to enter any designated judgment"[3] to which the claimant is constitutionally entitled and the Commissioner must refund the amount thus determined to be due.

In saying this, we are not passing upon the constitutional right of petitioner to a refund or upon the question whether in its case the shifting of the burden of the tax is or is not "susceptible of proof". Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 208-210. Petitioner's contention as to impossibility of proof is premature. Manifestly there is no impossibility so far as the production of proof of petitioner's operations or course of business is concerned. What is meant by impossibility of proof is impossibility of determination after these facts are in. Whether or not any such impossibility of determination will exist is a question which properly should await the ascertainment of the facts. For the present purpose it is sufficient to hold, and we do hold, that the

[3] See Note 1.

petitioner may constitutionally be required to present all the pertinent facts in the prescribed administrative proceeding and may there raise, and ultimately may present for judicial review, any legal question which may arise as the facts are developed.

These considerations also dispose of the contention that Section 902 "is so vague and uncertain that it is meaningless, and therefore affords no remedy". It was not necessary for the Congress, in insisting that a claimant should not recover where it appeared that he had not borne the burden of the tax, to attempt to formulate the conclusions which would be appropriate upon varying states of fact. Petitioner's argument, drawn from the writings of economists, is itself sufficient to show the futility of such an effort. The Congress could, and did, lay down a general principle and leave its application to the facts as they would appear in particular instances in a proceeding adapted to their full disclosure. The general principle thus laid down is no more vague and indefinite than the equitable doctrine which governs the right of recovery in actions for money had and received.

The presumptions under Section 907. Petitioner also contests the validity of the administrative proceeding because of the rules of evidence and presumptions which the statute establishes. Section 907 provides, with respect to processing taxes, that it "shall be *prima facie* evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax"; and that "If the average margin during the tax period was not lower, it shall be *prima facie* evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others".

The "tax period" is defined as the period in which the claimant actually paid the tax to a collector and ends with the last payment. The "period before and after the tax" is defined as "the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive". Provision is made for the computation of what is called the "average margin" for the respective periods, the "margin" being determined by deducting from the gross sales value of articles

processed the cost of the commodity processed and the processing tax.

Petitioner contends that the presumptions are entirely arbitrary and therefore unconstitutional. There is a general allegation to that effect in petitioner's amended complaint. But it cannot be said that the comparisons set up between the results of operations during the "tax period" and the "period before and after the tax" are wholly irrelevant. Nor can it now be determined what will be the effect of the presumptions. While petitioner assails them, its complaint contains no allegation as to their actual effect in relation to petitioner's operations. *Non constat* but that they may work to petitioner's advantage. For all that we know the presumption may establish *prima facie* that petitioner has borne the burden of the tax. Petitioner invites us to enter into a purely speculative inquiry for the purpose of condemning statutory provisions which have not been tried out and the effect of which cannot now be definitely perceived. We must decline that invitation and adhere to the fundamental principle which governs our determination of constitutional questions. *Liverpool, New York & Philadelphia Steamship Co.* v. *Commissioners,* 113 U. S. 33, 39; *Cincinnati* v. *Vester,* 281 U. S. 439, 448, 449; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324.

The stated presumptions are rebuttable. If they work adversely to its interests, petitioner will have ample opportunity to prove all the rebutting facts. Section 907 (e) provides that either the claimant or the commissioner may rebut the presumptions "by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax". There follows a detailed provision as to what such proof may include. But that provision is not exclusive. It is expressly stated that the proof in rebuttal shall not be limited to what is thus described. Petitioner urges that the statute requires that this proof shall be of the "actual extent" to which the burden of the tax has been shifted, and recurs to the argument as to the inherent impossibility of producing such proof. What we have already said with respect to that argument is applicable in this connection. We do not think that Congress was attempting to require the impossible. The permissible, and we think the true, construction of Section 907 (e) is that the words "*actual* extent" are used in contradistinction to the *presumed* extent, according to

the *prima facie* presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged either under Section 907 (a) or otherwise.

Procedural due process in the conduct of the administrative hearing.—Petitioner also complains that under Section 906 (d) the hearing is to be conducted, not by the Board of Review, or a division thereof, but by a "presiding officer" designated by the Secretary of the Treasury; and that under Section 906 (e) the presiding officer is to recommend to the Board, or a division, findings of fact and a decision. Petitioner urges that the Board, or its division, is not required by the statute to consider the evidence and hence that the procedure contemplated by Section 906 does not meet the requirements of due process. We find no merit in these contentions. There is no provision of the statute which is necessarily inconsistent with the observance of the due process required in hearings by administrative bodies. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *United States* v. *Abilene & Southern Rwy. Co.*, 265 U. S. 274, 288; *Morgan* v. *United States*, 298 U. S. 468, 480, 481; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, decided April 26, 1937. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it". *Chicago Junction case*, 264 U. S. 258, 265. Whatever the privilege or duty of the presiding officer, and whatever may be his recommendation, the statute requires that "the Board or a division shall make its findings of fact and decision in writing" and shall certify and file with the court on judicial review a transcript of the record upon which its findings and decision are based. The court has jurisdiction "to affirm the decision of the Board or to modify or reverse such decision". If additional evidence is taken "the Board may modify its findings of fact and decision" by reason of such evidence. The whole scheme of the administrative proceeding presupposes hearing and determination in accordance with the demands of due pro-

cess. The Board which makes its findings and renders its decision must consider the evidence and base its findings and decision upon it, and until the contrary appears we must assume that the Board will do so. *Morgan* v. *United States, supra.*

We conclude that the authorized procedure provides for a full and fair hearing and determination of all matters of fact and that, through judicial review, it provides for the protection of all the legal rights of the petitioner including any constitutional right which it may be entitled to invoke with respect to the refund which it seeks. The petitioner may thus obtain through this proceeding whatever judgment its case warrants, a judgment which the Government, by virtue of the requirement that the Commissioner shall make refund accordingly, binds itself to pay.

The judgment of dismissal is affirmed, but upon the grounds stated in this opinion.

It is so ordered.

Mr. Justice STONE and Mr. Justice CARDOZO concur in the opinion save that they reserve their vote as to the constitutional or statutory rights of the taxpayer in the event that it shall be impossible to ascertain whether there has been a shifting of the tax, an examination of those rights, in their judgment, being unnecessary now, since "impossibility of proof", in the language of the opinion, "may not be assumed".

Mr. Justice MCREYNOLDS dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.